86

(1)

Supreme Court, U.S.
FILED

No. _____

071089 FEB 18 2008

OFFICE OF THE CLERK

In The

Supreme Court of the United States

DR. HERMAN SMITH,

Petitioner,

v.

KAREN JO BARROW,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS P. BRANDT
Counsel of Record
JOSHUA A. SKINNER
ROBERT FUGATE
FANNING HARPER & MARTINSON, P.C.
4849 Greenville Ave., Suite 1300
Dallas, Texas 75206
(214) 369-1300

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964

QUESTIONS PRESENTED

1. When a public school teacher, who is denied a promotion to an administrative position in the public school district because she chooses to educate her children in a competing private school, asserts a parental rights claim against the public school superintendent based on his failure to promote her, is that Fourteenth Amendment claim subject to rational basis scrutiny pursuant to *Wisconsin v. Yoder*, 406 U.S. 205 (1972), or is it subject to a heightened level of scrutiny as held by the Fifth Circuit?

2. Whether it is appropriate, within the current framework of qualified immunity, to apply the law of the case doctrine in such a way as to preclude a public school superintendent from asserting the defense of qualified immunity, when the "law of the case" was based on facts which were assumed prior to trial and the superintendent's qualified immunity defense is based on the actual facts which were found at trial.

3. Whether the Fifth Circuit's approach to Smith's Rule 68 offer of judgment and interrelated legal issues regarding attorney's fees improperly serves to encourage wasteful litigation instead of encouraging the "just, speedy and inexpensive resolution of civil disputes."

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties to the proceeding in the court whose judgment is sought to be reviewed are:

Dr. Herman Smith (Smith), an individual	Petitioner
Ms. Karen Jo Barrow (Barrow), an individual	Respondent
Greenville Independent School District (GISD), a governmental entity	Party to District Court Judgment Only

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	viii
INTRODUCTION	1
OPINIONS BELOW	5
JURISDICTION	5
CONSTITUTIONAL AND STATUTORY PROVISIONS	5
STATEMENT OF THE CASE	8
A. Factual Background	8
B. Procedural History	9
REASONS FOR GRANTING THE WRIT	11
I. THE DECISION BELOW UNREASONABLY INTERFERES WITH THE MANAGEMENT OF PUBLIC SCHOOLS	11
A. The Fifth Circuit's Decisions Conflict with the Precedents of This Court	12
B. This Case Involves Important Legal Issues That This Court Should Resolve	14
C. The Fifth Circuit's Decisions Conflict with the Decisions of Other United States Courts of Appeals	16
D. Smith's Conduct Was Reasonable	17

TABLE OF CONTENTS – Continued

Page

II. THE FIFTH CIRCUIT DEPARTED FROM WELL-ESTABLISHED PRINCIPLES OF QUALIFIED IMMUNITY BECAUSE IT ADMITTED THAT THE LAW WAS NOT CLEAR, BUT STILL IMPOSED LIABILITY 21

A. What Constitutes "Clearly Established Law?" 22

B. The Problem of the Law of the Case Doctrine as Applied to Qualified Immunity Appeals 26

III. THE DECISION BELOW APPLIED THE WRONG LEGAL STANDARD FOR AWARDING ATTORNEY'S FEES AND FOR ANALYZING RULE 68 OFFERS OF JUDGMENT, THUS THWARTING RULE 68's PURPOSE OF ENCOURAGING SETTLEMENT 32

A. Barrow Was Awarded Fees for Unreasonable Activities 33

B. Barrow Did Not Meet Her Burden of Proof on Her Fee Request 36

C. The District Court Departed From Well-Established Principles of Law in Analyzing Smith's Offer of Judgment 39

CONCLUSION 43

TABLE OF CONTENTS – Continued

Page

APPENDIX

Appendix A
Circuit Court Opinion (Barrow III) ..... App. 1-24

Appendix B
Circuit Court Judgment (Barrow III) ..... App. 25-26

Appendix C
Circuit Court Opinion (Barrow II) ..... App. 27-38

Appendix D
Circuit Court Judgment (Barrow II) ..... App. 39-40

Appendix E
District Court Memorandum Opinion
(Dec. 20, 2005) ..... App. 41-118

Appendix F
District Court Amended Judgment
(Dec. 20, 2005) ..... App. 119-120

Appendix G
District Court Memorandum Opinion
(Aug. 5, 2005) ..... App. 121-204

Appendix H
District Court Memorandum Opinion
(March 25, 2005) ..... App. 205-206

Appendix I
District Court Judgment
(March 25, 2005) ..... App. 207-208

Appendix J
Court's Charge to the Jury ..... App. 209-237

TABLE OF CONTENTS – Continued

Page

Appendix K
Order (March 10, 2005) .....App. 238-241

Appendix L
Report (Judge Sanders) ..... App. 242-263

Appendix M
Order (June 4, 2004).....App. 264

Appendix N
Order (March 8, 2004) .....App. 265-266

Appendix O
Supreme Court Opinion (Nov. 10, 2003).... App. 267

Appendix P
Circuit Court Judgment (Barrow I) .....App. 268-269

Appendix Q
On Petition for Rehearing En Banc
(Barrow I).....App. 270-271

Appendix R
Circuit Court Opinion (Barrow I).....App. 272-280

Appendix S
District Court Memorandum Opinion
(April 18, 2002).....App. 281-309

Appendix T
District Court Order (March 4, 2002)....App. 310-312

Appendix U
District Court Memorandum Opinion
(Feb. 20, 2002) .....App. 313-332

Appendix V
District Court Judgment
(Feb. 20, 2002) .....App. 333-334

TABLE OF CONTENTS – Continued

Page

Appendix W
On Petition for Rehearing En Banc
(Barrow III).....App. 335-336

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 30

Angstadt v. Midd-West Sch. Dist., 377 F.3d 338 (3d Cir. 2004) 16

Arizona v. California, 460 U.S. 605 (1983) 30

Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) 1, 11

Brosseau v. Haugen, 543 U.S. 194 (2004) 22, 25, 26

Brown v. Bd. of Educ., 347 U.S. 483 (1952) 1

Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995) 16, 23

Bunting v. Mellen, 541 U.S. 1019 (2004) 22, 26

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988) 20, 31

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 13, 24

C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159 (3d Cir. 2005) 25

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 22, 26

Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267 (11th Cir. 2000) 21

Doe v. Heck, 327 F.3d 492 (7th Cir. 2003) 17

Employment Div. v. Smith, 494 U.S. 872 (1990) 13

Fair Housing Council v. Landow, 999 F.2d 92 (4th Cir. 1993) 37, 38

TABLE OF AUTHORITIES – Continued

Page

Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951 (2006) 2, 11

Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000) 15, 17

Hensley v. Eckerhart, 461 U.S. 424 (1983) 34, 35, 36

Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996) 16, 23

Hooks v. Clark County Sch. Dist., 228 F.3d 1036 (9th Cir. 2000) 16

Hotel & Rest. Employers Local 25 v. JPR, Inc., 136 F.3d 794 (D.C. Cir. 1998) 35

Hutchins v. District of Columbia, 188 F.3d 531 (D.C. Cir. 1999) (en banc) 17

Immediato v. Rye Neck Sch. Dist., 73 F.3d 454 (2d Cir. 1996) 16, 23

Jacobs v. Mancuso, 825 F.2d 559 (1st Cir. 1987) 35

Key v. Grayson, 179 F.3d 996 (6th Cir. 1999) 21

Kinney v. Weaver, 367 F.3d 337 (5th Cir. 2004) (en banc) 21

Kite v. Marshall, 661 F.2d 1027 (Former 5th Cir. Nov. 1981) 16, 23

Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003) 16

Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001) 15, 16

Luciano v. Olsten Corp., 109 F.3d 111 (2d Cir. 1997) 35

TABLE OF AUTHORITIES – Continued

Page

Marek v. Chesny, 473 U.S. 1 (1985) 39

Mares v. Credit Bureau of Raton, 801 F.2d 1197 (10th Cir. 1986) 36

Marsh v. Butler County, 268 F.3d 1014 (11th Cir. 2001) 21

McCurdy v. Dodd, 352 F.3d 820 (3d Cir. 2003) 25

Messenger v. Anderson, 225 U.S. 436 (1912) 30

Meyer v. Nebraska, 262 U.S. 390 (1923) 12, 16, 24

Morse v. Frederick, ___ U.S. ___, 127 S. Ct. 2618 (2007) 1, 11, 22, 26

Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988) 16, 23

Ohio Ass'n of Indep. Sch. v. Goff, 92 F.3d 419 (6th Cir. 1996) 16, 23

Panama R. Co. v. Napier Shipping Co., 166 U.S. 280 (1987) 20

Parker v. Hurley, ___ F.3d ___, 2008 U.S. App. Lexis 2070 (1st Cir. 2008) 11

Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) 12, 16, 24

Runyon v. McCrary, 427 U.S. 160 (1976) 13, 24

Sands v. Runyon, 28 F.3d 1323 (2d Cir. 1994) 35

Saucier v. Katz, 533 U.S. 194 (2001) 23, 25, 28

Scott v. Harris, ___ U.S. ___, 127 S. Ct. 1769 (2007) 22, 23, 25, 26

TABLE OF AUTHORITIES – Continued

Page

Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998) 16, 23

Troxel v. Granville, 530 U.S. 57 (2000) ..... *passim*

United Slate, Tile & Composition v. G&M Roofing, 732 F.2d 495 (6th Cir. 1984) 36

United States v. Hatter, 532 U.S. 557 (2001) 30

United States v. Lanier, 520 U.S. 259 (1997) 23

United States v. Loy, 237 F.3d 251 (3d Cir. 2001) 17

United States v. Metro. Dist. Comm'n, 847 F.2d 12 (1st Cir. 1988) 35

Wilson v. Layne, 526 U.S. 603 (1999) 21

Wisconsin v. Yoder, 406 U.S. 205 (1972) 2, 13, 20, 24, 28

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 19

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 8, 14, 17, 27

U.S. Const. amend. XIV, § 1 ..... *passim*

STATUTES

28 U.S.C. § 471 ..... 4, 33

28 U.S.C. § 1254 5

42 U.S.C. § 1983 ..... 6, 25

42 U.S.C. § 1988 ..... 6, 7

TABLE OF AUTHORITIES – Continued

Page

RULES

FED. R. CIV. P. 68 .....*passim*

TREATISES

E. Chemerinsky, *Constitutional Law* § 12.3.2.3 (3d ed. 2006) 13

OTHER AUTHORITIES

147 Cong. Rec. S13322-03 (daily ed. Dec. 17, 2001) (Statement of Sen. Carper).....19

INTRODUCTION

Education is "perhaps the most important function" of local governments. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1952). Parental rights are "perhaps the oldest of the fundamental liberty interests recognized by the Court." *Troxel v. Granville,* 530 U.S. 57, 66 (2000). This case involves a conflict between these two important and fundamental interests. It involves the intersection of the right of parents to direct the education of their children and the duty of public school administrators to provide efficient and effective educational services to the local community. It involves the discretion afforded to a public school superintendent to make reasonable decisions in furtherance of the school district's efforts to maintain the positive perception of its schools and the extent to which the Fourteenth Amendment limits that discretion. This case arises out of a public school superintendent's decision to impose a patronage requirement on public school administrators.

Public school administrators have a difficult and vitally important job. *Morse v. Frederick,* ___ U.S. ___, 127 S. Ct. 2618, 2629 (2007). They are role models whose words and actions are read by students, parents and the general public. *Bethel Sch. Dist. v. Fraser,* 478 U.S. 675, 683 (1986). In addition to their traditional role as educators, public school superintendents have, in recent years, been forced to assume a new role as CEO. With the enactment of the *No Child Left Behind Act* and various school choice initiatives, public school districts have been subjected

to competition and market forces in ways that might have seemed impossible a few years earlier. Modern public school superintendents are now expected to operate their school districts more like competitive businesses. Just as it should come as no surprise that General Motors might not be pleased if its CEO bought a Ford, it should come as no surprise that a patronage requirement for public school administrators might be considered appropriate in light of recent developments in the law.

When a parent, who is employed as a teacher in a public school district, seeks a promotion to become an administrator in the school district, that parent-employee must know that by accepting the benefits of the position she implicitly accepts the limitations of the position. *Garcetti v. Ceballos,* 547 U.S. 410, 126 S. Ct. 1951, 1958 (2006). She must know that her rights as a parent-employee are not greater than her rights as a parent alone.

Parental rights claims are subject to rational basis scrutiny unless they are combined with a Free Exercise claim. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). Despite this Court's holding in *Yoder,* the Fifth Circuit concluded that Barrow's parental rights claim, although unconnected from a Free Exercise claim, was subject to heightened scrutiny. The Fifth Circuit's decision conflicts with decisions of this Court as well as decisions of other United States Courts of Appeals and involves an important question of federal law which needs to be resolved because of its profound impact upon the management of public

schools in an increasingly competitive environment. The Court should grant Smith's petition in order to establish the appropriate level of scrutiny to apply to parental rights claims brought by public school employees.

This case also involves important questions regarding qualified immunity. The decision below undermines the promise of qualified immunity by declaring that Smith's conduct violated "clearly established law" even though the Fifth Circuit was unsure whether Smith's conduct violated the Constitution and even though a respected and experienced federal district court judge found that the law was not clear and that Smith's actions were objectively reasonable.

When the Fifth Circuit held "No reasonable official could conclude that the application of the school district's public-school patronage policy to Barrow was constitutional," App. 280, it ignored the fact that a respected federal district judge, in a thorough opinion, had upheld Smith's actions as proper. The Fifth Circuit held Smith to a higher understanding of the law than a federal judge with over two decades of experience on the bench. That should not be. School administrators have a difficult enough job without the daunting threat of liability for damages solely because they cannot predict constitutional jurisprudence. This Court should grant review to provide much-needed guidance on (i) the meaning of a "clearly established right" and (ii) whether, in light of the broad latitude traditionally accorded public school

officials in their day-to-day discretionary functions, the qualified immunity doctrine should be applied more flexibly in the sensitive context of public school education.

After the jury found that Barrow's parental rights claim was unconnected to a Free Exercise claim, the Fifth Circuit misused the procedural framework of qualified immunity to avoid a straightforward application of *Yoder*'s rational basis test. Even though the Fifth Circuit admitted that Smith's application of *Yoder* had merit, the court nevertheless refused to address the issue by referring to the earlier panel's decision as "law of the case." This Court should grant Smith's petition in order to address these important issues concerning qualified immunity.

Finally, this case involves three important and interrelated questions regarding how to analyze Rule 68 offers of judgment and requests for attorney's fees in order to "ensure just, speedy, and inexpensive resolutions of civil disputes." 28 U.S.C. § 471. The three questions concern whether district courts are required to award fees for time spent on unreasonable and unsuccessful motions, whether an award of fees can be based on unreliable evidence, and whether a district court can disregard its own factual findings in order to avoid the effectiveness of a Rule 68 offer of judgment which the court acknowledged would have made Barrow whole.

OPINIONS BELOW

The orders and judgments of the United States District Court for the Northern District of Texas are reprinted at App. 41-118, 121-206, 238-266, and 281-332 and are not otherwise published. The three opinions of the United States Court of Appeals for the Fifth Circuit are reported or available at 332 F.3d 844 (5th Cir. 2003), *cert. denied*, 540 U.S. 1005 (2003) (*Barrow I*) (App. 272-280), 480 F.3d 377 (5th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 255 (2007) (*Barrow II*) (App. 27-38), and 2007 U.S. App. Lexis 24778 (5th Cir. 2007) (*Barrow III*) (App. 1-24). The Court of Appeals order denying rehearing and rehearing en banc is reprinted at App. 335-336 and is not otherwise published.

JURISDICTION

The Fifth Circuit decided *Barrow III* on October 23, 2007, and denied rehearing and rehearing on banc on November 20, 2007. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

FOURTEENTH AMENDMENT

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

42 U.S.C. Section 1988(b)

§ 1988. Proceeding in vindication of civil rights

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such

action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b).

Federal Rule of Civil Procedure 68

Rule 68. Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer.

More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer.

An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability Is Determined.

When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer

of judgment. It must be served within a reasonable time – but at least 10 days – before a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer.

If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

FED. R. CIV. P. 68.

STATEMENT OF THE CASE

A. Factual Background.

In 1998, an administrative position, that of assistant principal of the middle school, became open at the Greenville Independent School District ("GISD"). Ms. Karen Barrow ("Barrow"), a teacher at GISD, expressed interest in being promoted to the position. Barrow's children were enrolled in a nearby, competing private school.

Barrow brought suit against GISD and its superintendent, Dr. Herman Smith ("Smith"), because she was not promoted. Barrow alleged that GISD and Smith had violated her religious rights under the First Amendment and her parental rights under the Fourteenth Amendment by failing to promote her.

At trial, Barrow lost her First Amendment religious rights claim against both defendants and her Fourteenth Amendment parental rights claim against GISD. Barrow's only victory was on her Fourteenth

Amendment parental rights claim against Smith. The jury found that Smith had violated Barrow's parental rights when he failed to promote her because she refused to enroll her children in public school. App. 217-222. The jury awarded Barrow $15,455 in compensatory damages and $20,000 in punitive damages against Smith. App. 226-227, 228-229.

B. Procedural History.

1. On May 1, 2000, Barrow brought suit against Smith and GISD.

2. On January 18, 2001, Smith submitted a Rule 68 offer of judgment of $100,000. App. 96, 171 n.17. Barrow rejected the offer.

3. On February 20, 2002, the district court ruled that Smith was entitled to qualified immunity from Barrow's claims and entered a judgment in his favor. App. 310-332. Barrow appealed.

4. On June 2, 2003, the Fifth Circuit reversed the district court's grant of summary judgment to Smith [App. 272-280 (*Barrow I*)] and on November 10, 2003, this Court denied Smith's petition for writ of certiorari. App. 267.

5. After the Fifth Circuit decided *Barrow I*, but before the case was tried, the district court submitted the case to Senior Judge Barefoot Sanders for a preliminary determination on the issue of attorney's fees – the sole issue preventing a settlement of the

case. Judge Sanders recommended that Barrow's fee request be denied in its entirety.

6. After a two week trial, the jury reached its verdict on March 25, 2005. App. 207, 209. The jury rejected all of Barrow's claims against GISD and rejected the religious rights claim Barrow brought against Smith. The jury found in Barrow's favor on only one of her claims against Smith – her parental rights claim. App. 221-222.

7. Smith filed timely post-trial motions which were denied. App. 121-204.

8. Barrow appealed the judgment in favor of GISD and the Fifth Circuit affirmed. App. 27-38 (*Barrow II*). On October 1, 2007, this Court denied Barrow's petition for writ of certiorari.

9. Barrow filed her request for attorney's fees, which was granted in part [App. 41-118] and the district court issued an Amended Judgment. App. 119-120.

10. Smith appealed and Barrow cross-appealed. App. 2.

11 On October 23, 2007, the Fifth Circuit denied Smith's appeal and Barrow's cross-appeal [App. 1-24 (*Barrow III*)] and on November 20, 2007, denied Smith's motion for rehearing and rehearing en banc. App. 335-336.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW UNREASONABLY INTERFERES WITH THE MANAGEMENT OF PUBLIC SCHOOLS.

In order to meet the needs of students and maintain high standards, public school superintendents should be permitted to impose reasonable regulations on school administrators, even when those regulations impact an administrator's exercise of her parental right to direct the education of her children.

"Public schools often walk a tightrope between the many competing constitutional demands made by parents, students, teachers, and the schools' other constituents." *Parker v. Hurley*, ___ F.3d ___, 2008 U.S. App. Lexis 2070, *53 (1st Cir. 2008). These competing demands highlight why, when a private citizen enters government service, the citizen, by necessity, must accept certain limitations on his or her freedom. *Garcetti*, 126 S. Ct. at 1958. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 126 S. Ct. at 1958. Public employees often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions. *Id.* School personnel, particularly administrators, represent governmental entities in an unusually public manner. *Fraser*, 478 U.S. at 683; *Morse*, 127 S. Ct. at 2629.

Despite the precedent of this Court and of Courts of Appeals across the country which hold that the parental rights claims of citizens are entitled to rational basis scrutiny, the Fifth Circuit applied heightened scrutiny to the parental rights claim of a public school employee. This Court should make clear that public school administrators are not entitled to greater parental rights than parents who are not employed by the government. If a parental rights claim brought by a citizen is entitled to rational basis scrutiny, then it should not be the case that, when that parent becomes a school employee that parent's claim is then favored with a heightened level of scrutiny.

A. The Fifth Circuit's Decisions Conflict with the Precedents of This Court.

The Fifth Circuit's decisions in *Barrow I* and *Barrow III* conflict with the precedents of this Court which have repeatedly used the language of rational basis scrutiny when evaluating parental rights claims. Despite this Court's clear precedent, the Fifth Circuit applied heightened scrutiny.

This Court has repeatedly used the language of rational basis scrutiny when evaluating parental rights claims. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) ("[T]his liberty may not be interfered with ... by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect"); *Pierce v. Soc'y of*

Sisters, 268 U.S. 510, 535 (1925) ("[R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state"); *Yoder*, 406 U.S. at 233 (parental rights claims, when unconnected from a free exercise claim, are subject to rational basis scrutiny); *Runyon v. McCrary*, 427 U.S. 160, 177-179 (1976) ("[Parents] have no constitutional right to provide their children with private school education unfettered by reasonable government regulation."); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 567 n.4 (1993) (Souter, J., concurring) (pursuant to *Pierce* and *Yoder*, parental rights claims, when unconnected from a free exercise claim, are subject to rational basis scrutiny).

This Court has only applied heightened scrutiny to a parental rights claim when that parental rights claim has been coupled with a Free Exercise claim. *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990); *Yoder*, 406 U.S. at 233. Parental rights claims which are coupled with a Free Exercise claim are "hybrid-rights" claims and, arguably, are entitled to heightened scrutiny. *Smith*, 494 U.S. at 881; *Yoder*, 406 U.S. at 233.[1]

While *Barrow III* acknowledged that Smith may be correct in arguing that "only rational basis – and

---

[1] For a discussion of the conflicting approaches taken by various courts, see E. Chemerinsky, *Constitutional Law* § 12.3.2.3, at 1262 (3d ed. 2006).

not strict scrutiny – should be applied in evaluating a state action that imposes requirements on parental decisions regarding education," it nevertheless applied heightened scrutiny to Barrow's parental rights claim. App. 17. *Barrow III* held that

> a state cannot take an adverse employment action against a public-school employee for exercising [the right to educate his or her children in private school] unless it can prove that the employee's selection of private school materially and substantially affects the state's educational mission

App. 11 (citing *Barrow I* (App. 277)). *Barrow III* acknowledged that this level of scrutiny is a form of heightened scrutiny, though it did not specify whether it was strict scrutiny or some intermediate level of scrutiny. App. 11-12 (citing *Barrow I* (App. 280 n.20)). *Barrow III* also held that heightened scrutiny applied "regardless of whether First Amendment religious rights or merely more general due process parental rights were involved." App. 20. This Court should grant Smith's petition because the decisions below conflict with this Court's prior decisions which applied rational basis scrutiny to parental rights claims.

B. This Case Involves Important Legal Issues That This Court Should Resolve.

If this Court has not already established the proper standard for evaluating parental rights claims, then it should do so. Despite this Court's prior

decisions indicating that rational basis scrutiny is the appropriate standard to be applied to parental rights claims, there appears to be a great deal of confusion concerning this issue which seems to have increased following this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000). Two aspects of *Troxel* have contributed to this confusion.

First, *Troxel* failed to articulate the appropriate standard of review for parental rights claims. *Id.* at 80 (Thomas, J., concurring) ("The opinions of the plurality [...] recognize such a right, but curiously none of them articulates the appropriate standard of review.").

Second, by referring to parental rights as "fundamental rights," the plurality in *Troxel* created confusion by arguably implying that heightened scrutiny may be the appropriate standard. *Id.* at 65-66. For example, Justice Thomas, in his concurrence, interpreted the language of "fundamental rights" as a basis for applying strict scrutiny. *Id.* at 80. This confusion has caused a split in the circuits. *Compare Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 289 (5th Cir. 2001) (applying rational basis) and *Gruenke v. Seip*, 225 F.3d 290, 304-05 (3d Cir. 2000) (applying strict scrutiny). This Court should grant Smith's petition because of the importance of the issue, the confusion surrounding it, and the likelihood that this issue will continue to arise in the management of public schools throughout the country and in litigation involving parental rights.

C. The Fifth Circuit's Decisions Conflict with the Decisions of Other United States Courts of Appeals.

The Fifth Circuit's decisions conflict with the precedents of numerous other courts of appeals which have held that parents' rights to direct the education of their children, when unconnected from a Free Exercise claim, are entitled to only rational basis scrutiny.[2]

---

[2] *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (*Meyer* and *Pierce* indicate rational basis scrutiny for parental rights claims); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461 (2d Cir. 1996) ("rational basis review applies."); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (applying rational basis scrutiny post-*Troxel*); *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 343-44 (3d Cir. 2004) (applying rational basis); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996) ("reasonable regulation by the state is permissible even if it conflicts with that interest. That is the language of rational basis scrutiny."); *Littlefield*, 268 F.3d at 291 ("a rational-basis test is the appropriate level of scrutiny for parental rights in the public school context"); *Kite v. Marshall*, 661 F.2d 1027, 1029 (Former 5th Cir. Nov. 1981) (applying rational basis scrutiny to parental rights claim and noting that in "situations which, at first blush, appear to rest at the heart of parental decision making, the Supreme Court refrained from clothing parental judgment with a constitutional mantle."); *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 423 (6th Cir. 1996) ("the Court has applied rational basis review"); *Murphy v. Arkansas*, 852 F.2d 1039, 1043-44 (8th Cir. 1988) (applying rational basis scrutiny to state home-schooling regulations); *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036, 1041-42 (9th Cir. 2000) (applying rational basis to *Meyer/Pierce* parental rights); *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 698-700 (10th Cir. 1998) (rejecting heightened scrutiny in favor of rational basis scrutiny).

Other courts of appeals have applied various forms of heightened scrutiny to parental rights claims.[3] Frequently, the courts of appeals have failed to decide what standard is appropriate or, as in *Barrow I*, failed to even decide the textual source of the right they were analyzing. App. 275 ("Our inquiry at this stage is limited to the question whether there is a recognized constitutional right and not whether that right is grounded in the First Amendment, the Fourteenth Amendment, or both.").

In light of the conflicts created by the Fifth Circuit's decisions in *Barrow I* and *Barrow III* and the conflicts that already existed among the circuits regarding parental rights claims, this Court should resolve this substantial, on-going split among the circuits.

D. Smith's Conduct Was Reasonable.

Judge Fitzwater, an experienced and well-respected district court judge, correctly concluded that Smith had a rational basis for his conduct and

---

[3] *See, e.g.*, *Gruenke*, 225 F.3d at 304-05 (3d Cir. 2000) (applying strict scrutiny in light of *Troxel*); *Doe v. Heck*, 327 F.3d 492, 520 (7th Cir. 2003) ("Thus, after *Troxel*, it is not entirely clear what level of scrutiny is to be applied.... What is evident, however, is that courts are to use some form of heightened scrutiny"); *Hutchins v. District of Columbia*, 188 F.3d 531, 541-46 (D.C. Cir. 1999) (en banc) (applying intermediate scrutiny); *United States v. Loy*, 237 F.3d 251, 269 (3d Cir. 2001) (applying strict scrutiny).

that his conduct was "objectively reasonable." The evidence in the record supports the district court's conclusion.[4] Perhaps the best evidence of the reasonableness of Smith's decision came from Barrow herself. Barrow admitted that a person in the community "could legitimately and reasonably form the opinion that having a senior administrative person ... have his or her children enrolled in a private school [is] a vote of no confidence in the public school." V. 61, pp. 4622-23 and DN 439, p. 244.[5] The record reflects that this "vote of no confidence" perception existed in the community. Barrow also admitted that "reasonable people can disagree about whether or not it materially and substantially impedes the educational mission of the school district to promote to administrative positions people who have their children enrolled in private schools." V. 61, pp. 4622-23 and DN 439, p. 245. Moreover, the record reflects that patronage policies were an accepted practice in many Texas school districts and that public school funding in Texas is directly tied to the number of students enrolled.

Barrow's admissions and the record evidence underscore the reasonableness of Smith's conduct. With increasing competition between public schools and private schools, patronage policies are likely to

---

[4] The district court excluded most of this evidence. Without this evidence, it is understandable that the jury decided against Smith.

[5] The Fifth Circuit record is divided into volumes cited as "V. ___, p. ___" and loose docket entries cited as "DN ___, p. ___."

represent the next step towards treating schools more like competitive businesses. In 2001, Congress enacted the *No Child Left Behind Act*, which, "injected competition and market forces into our public schools in ways that might have seemed impossible half a dozen years ago"[6] and in 2002, this Court upheld a state law authorizing parents to assign tax dollars to another public school or to a private school upon their decision not to enroll their children in the schools of the public school district in which they reside. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). With competition between public and private schools increasing across the country, public school districts need clarification from this Court in order to fulfill their mission to efficiently and effectively educate the children entrusted to their care.

The reasonableness of Smith's conduct is also evident when one considers the particular circumstances of the local community. When Smith was hired, the community was suffering from racial tension caused by recent burnings of African-American churches.[7] Smith was recommended by the NAACP and hired, in part, for the specific purpose of

---

[6] 147 Cong. Rec. S13322-03, S13336 (daily ed. Dec. 17, 2001) (Statement of Sen. Carper).

[7] Racial tensions have historically been an issue in this community. Until the late 1960s or early 1970s, the City of Greenville had a sign at its city limits which read "The Blackest Land, The Whitest People." DN 514 (Trial Transcript V.9, p.12); *see also* http://www.georgetownbookshop.com/georgetown/display2.asp?id=684 (Georgetown Book Shop).

easing racial tensions. In light of the racial tensions which existed in Greenville and the prominence of public school administrators in the community, it is certainly reasonable to think that Barrow's choice of a virtually all-white private school with an all-white faculty could be perceived as detrimental to easing racial tensions. V.62, pp.4835-36; DN 512 (Trial Transcript V.7, pp.231-32). Regardless of Barrow's subjective intention in sending her children to the Greenville Christian School, a patronage policy was a reasonable regulation of her rights in this situation.

Even though *Barrow III* recognized that "it is possible to argue that without a situation akin to that in [*Yoder*], only rational basis – and not strict scrutiny – should be applied," App. 17; it nevertheless concluded that *Barrow I* was "law of the case," and, therefore, it had to apply heightened scrutiny. App. 19. Regardless, the "law of the case cannot bind this Court in reviewing decisions below." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (citing *Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 283-284 (1987)). "Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review." *Id.* at 817-818. Even if the law of the case doctrine was binding on the Fifth Circuit, it is not binding on this Court. This Court should grant Smith's petition in order to correct the conflict between *Barrow I* and *Yoder*.

II. THE FIFTH CIRCUIT DEPARTED FROM WELL-ESTABLISHED PRINCIPLES OF QUALIFIED IMMUNITY BECAUSE IT ADMITTED THAT THE LAW WAS NOT CLEAR, BUT STILL IMPOSED LIABILITY.

Barrow III departs from well-established principles of qualified immunity by admitting that the law was not clear, but nevertheless imposing liability. *Barrow III* inappropriately used the law of the case doctrine to bar Smith from raising the defense of qualified immunity, even though the facts found by the jury were materially different from the facts which were presumed at the time *Barrow I*, a qualified immunity appeal, was decided.

The Fifth Circuit denied Smith's entitlement to qualified immunity even though both the district court and the panel in *Barrow III* concluded that the law was not clearly established. This denial of qualified immunity in the face of judicial disagreement conflicts with this Court's pronouncement that "[i]f judges . . . disagree on a constitutional question, it is unfair to subject [governmental actors] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999).[8]

---

[8] *See also Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267, 1274 (11th Cir. 2000); *Marsh v. Butler County*, 268 F.3d 1014, 1039 n.20 (11th Cir. 2001); *Key v. Grayson*, 179 F.3d 996, 1002 (6th Cir. 1999); *Kinney v. Weaver*, 367 F.3d 337, 398 (5th Cir. 2004) (en banc) (Jolly, J., dissenting) ("It seems disingenuous to hold that the law is *clearly* established when it takes 20,467 words to

(Continued on following page)

This case raises important questions regarding the proper application of the concept of "clearly established law." If judges disagree about the law, how can it be said that the law is "clearly established?" This case also raises important and fundamental questions regarding the current analytical framework of qualified immunity. This Court has often recognized, but never resolved, the problems associated with determining Constitutional questions in qualified immunity appeals. *See County of Sacramento v. Lewis*, 523 U.S. 833, 858-859 (1998); *Bunting v. Mellen*, 541 U.S. 1019, 1023-1024 (2004); *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004); *Morse*, 127 S. Ct. at 2641; *Scott v. Harris*, ___ U.S. ___, 127 S. Ct. 1769, 1774 n.4 (2007). This unresolved question concerns the relationship between a pre-trial determination of a Constitutional question in a qualified immunity appeal and the application of the law of the case doctrine. The Court should grant Smith's petition in order to resolve these two important issues.

A. What Constitutes "Clearly Established Law?"

Under this Court's current analytical framework for qualified immunity, lower courts are required first to resolve the following threshold question: Taken in the light most favorable to the party asserting the

---

explain, and when six United States Court of Appeals judges sharply disagree about it.").

injury, do the facts alleged show that the public official's conduct violated a constitutional right? *Scott*, 127 S. Ct. at 1774 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). "If, and only if, the court finds a violation of a constitutional right, 'the next, sequential step is to ask whether the right was clearly established.'" *Scott*, 127 S. Ct. at 1774. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201.

The "clearly established" standard is "the adaptation of the fair warning standard to give officials ... the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *United States v. Lanier*, 520 U.S. 259, 270-71 (1997). The Fifth Circuit departed from the well-established standards of qualified immunity by imposing liability, including punitive damages, on Smith despite implicitly holding that the law was not clearly established.

In 1998, when Barrow was denied the promotion, the boundaries of the Fourteenth Amendment parental right were unclear and numerous courts of appeals, including the Fifth Circuit, had held that claims involving the parental right to direct the education of one's children were subject to reasonable regulation. *See, e.g., Brown*, 68 F.3d at 533; *Immediato*, 73 F.3d at 461; *Herndon*, 89 F.3d at 179; *Kite*, 661 F.2d at 1029; *Goff*, 92 F.3d at 423; *Murphy*, 852 F.2d at 1043-44; *Swanson*, 135 F.3d at 698-700. Numerous decisions applied rational basis scrutiny to

parental rights claims in light of this Court's consistent use of the rational basis standard in parental rights cases. *Meyer*, 262 U.S. at 399-400; *Pierce*, 268 U.S. at 535; *Yoder*, 406 U.S. at 233; *Runyon*, 427 U.S. at 177-179; *Church of Lukumi Babalu Aye*, 508 U.S. at 567 n.4 (Souter, J., concurring).

In February of 2002, the district court granted Smith summary judgment, finding that he was entitled to qualified immunity because the law was not clearly established, there was a rational basis for his conduct and his conduct was objectively reasonable. App. 310-332. Despite all of the uncertainty in the law and despite the conclusion of the district court that Smith's conduct did not violate clearly established law, that he had a rational basis for his conduct and that his conduct was objectively reasonable, *Barrow I* concluded that no reasonable official could conclude that Smith's actions were constitutional.

Two years *after* Smith's decision, Justice Souter noted in *Troxel* that this Court had not yet clearly described the boundaries of parental rights. *Troxel*, 530 U.S. at 78 (Souter, J., concurring) ("Our cases ... have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child."). Justice Kennedy in his dissent in *Troxel* cautioned that, although parental rights exist in "broad formulation," the courts should use "considerable restraint ... as they seek to give further and precise definition to the right." *Id.* at 95. Justice Thomas, in his concurrence, noted that although the

plurality opinions in *Troxel* recognized parental rights, none of the justices had articulated the appropriate level of scrutiny. *Id.* at 80.

In 2003, five years *after* Smith's decision, the Seventh and the Third Circuits recognized the uncertainty which surrounded parental rights claims. *Doe*, 327 F.3d at 520 ("[A]fter *Troxel*, it is not entirely clear what level of scrutiny is to be applied"); *McCurdy v. Dodd*, 352 F.3d 820, 825 (3d Cir. 2003) ("in § 1983 cases grounded on alleged parental liberty interests, we are venturing into the murky area of unenumerated constitutional rights.").

In 2005, seven years *after* Smith's decision, the Third Circuit noted that although this Court had never been called upon to define the precise boundaries of a parent's right to control a child's upbringing and education, it was clear that the right was neither absolute nor unqualified. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3d Cir. 2005).

The "rigid order of battle" requirement of *Saucier* has resulted in lower courts deciding constitutional issues in overly broad terms. *See Brosseau*, 543 U.S. 194. As this Court noted in *Scott* that "[t]here has been doubt expressed regarding the wisdom of *Saucier*'s decision to make the threshold inquiry mandatory, especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward." *Scott*,

127 S. Ct. at 1774 n.4.[9] *Barrow I*, for example, addressed the issue so broadly that it did not even tell the parties where the right came from or what level of scrutiny was applicable to the claim. All that *Barrow I* said was that the law was "clearly established."

In light of the uncertainty that exists in the area of parental rights, it is hard to understand how the Fifth Circuit could have concluded that the law was clearly established unless the concept of "clearly established law" had lost all its meaning. This Court should grant Smith's petition to bring clarity to the concept of clearly established law.

The problem of the overly broad definition of rights in *Barrow I* was compounded in *Barrow III* by the Fifth Circuit's use of the doctrine of law of the case. The application of law of the case is particularly troubling in a case such as this which involves the difficult framework of qualified immunity, which has been criticized by this Court.

B. The Problem of the Law of the Case Doctrine as Applied to Qualified Immunity Appeals.

Barrow III applied the law of the case doctrine so as to preclude Smith from asserting the defense of

---

[9] *See also Lewis*, 523 U.S. at 858-859; *Bunting*, 541 U.S. at 1019, 1023-1025; *Brosseau*, 543 U.S. at 198 n.3 and 201-202; *Scott*, 127 S. Ct. at 1774 n.4; *Morse*, 127 S. Ct. at 2641.

qualified immunity, when the law of the case was based on facts which were presumed prior to trial and the superintendent's qualified immunity defense was based on the actual facts which were found at trial. The improper application of law of the case is underscored by a brief review of the procedural history of the case.

Barrow brought suit against Smith and GISD alleging that in 1998 they had refused to promote her to an administrative position because she enrolled her children in a private religious school. App. 3-4. Barrow claimed that this decision violated her First Amendment free exercise rights and her Fourteenth Amendment parental rights. App. 274-275.

The district court granted Smith summary judgment, finding that he was entitled to qualified immunity because the law was not clearly established and because his conduct was objectively reasonable. App. 4. In *Barrow I*, the Fifth Circuit reversed the grant of summary judgment and remanded the case to the district court for further proceedings. App. 280. *Barrow I* specifically refused to decide whether the right claimed by Barrow was "grounded in the First Amendment, the Fourteenth Amendment, or both." App. 275.

At trial, Barrow asserted two claims against Smith – a religious rights claim and a parental rights claim. App. 4-5. The jury rejected Barrow's religious rights claim, but found in her favor on her parental rights claim. *Id.* Smith argued in post-trial motions

and on appeal that because Barrow lost on her religious rights claim, Smith was entitled to qualified immunity because: (1) parental rights claims, when unconnected to a religious rights claim, are entitled to rational basis scrutiny; and (2) assuming that heightened scrutiny applies, it was not clearly established that heightened scrutiny applied to parental rights claims when those claims are unconnected to a religious rights claim. App. 5-6.

Barrow III acknowledged that parental rights claims, when unconnected to a religious rights claim, might be subject to rational basis scrutiny.

> [W]e acknowledge that it is possible to argue that without a situation akin to that in *Wisconsin v. Yoder*, ... only rational basis – and not strict scrutiny – should be applied in evaluating a state action that imposes requirements on parental decisions regarding education.... *Yoder* arguably supports Smith's contention that heightened scrutiny is appropriate only where the state action also adversely affects free exercise of religion, which the jury verdict in this case makes clear is no longer at issue.

App. 17. This acknowledgement by the Fifth Circuit is important, particularly when one considers it within the context of the current analytical framework for qualified immunity. *See Saucier*, 533 U.S. 194.

Under the *Saucier* framework, the first question is whether the public official's conduct violated a

constitutional right while the second question is whether the right was clearly established in light of the specific context of the case. *Barrow III* admitted that since no religious claim exists in the case, the appropriate standard of review might be rational basis. By admitting that rational basis scrutiny might be the appropriate standard, *Barrow III* admitted that Smith's decision arguably did not violate Barrow's constitutional rights at all much less violate her clearly established constitutional rights. Given the fact that *Barrow III* admitted that rational basis scrutiny is arguably the appropriate standard and given the fact that the district court originally concluded that there was a rational basis for Smith's conduct, it seems ironic that *Barrow III* held that Smith should be made to pay to Barrow actual damages, punitive damages and an enormous amount of attorney fees (over $640,000). How can *Barrow III* admit, on the one hand, that there arguably has been no constitutional violation at all while, on the other hand, affirm that Smith's conduct violated clearly established constitutional law? The answer *Barrow III* gives is "law of the case." App. 19.

Barrow III's invocation of "law of the case" is improper. *Barrow III* held, in essence, that although it was concerned that *Barrow I* was wrongly decided and may conflict with *Yoder*, it could not do anything to rectify the conflict. The admission in *Barrow III* that there may be a conflict between *Barrow I* and *Yoder* highlights the need for granting Smith's petition.

"The law of the case doctrine presumes a hearing on the merits." *United States v. Hatter*, 532 U.S. 557, 566 (2001). The doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not [to limit] their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). It is "understandably crafted with the course of ordinary litigation in mind" and while it "directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618-19 (1983). The doctrine does not apply if the prior decision "is clearly erroneous and would work a manifest injustice." *Id.* at 618 n.8; *Agostini v. Felton*, 521 U.S. 203, 236 (1997). One basis for finding that adherence to the prior decision would work a manifest injustice is that the erroneous prior decision affects the validity of the plaintiff's claim. *Id.* at 236.

Barrow III should not have applied the law of the case doctrine because: (1) there was no hearing on the merits in *Barrow I* regarding a parental rights claim unconnected to a free exercise claim; (2) *Barrow I* and *Barrow III* are clearly erroneous because they deviate from this Court's precedents which apply rational basis scrutiny to parental rights claims; and (3) adherence to the prior decision (*Barrow I*) would work a manifest injustice because establishing a heightened level of scrutiny is determinative of whether Barrow's claim is successful. If *Barrow III* had applied rational basis scrutiny instead of following *Barrow I*, Smith would have prevailed because Smith's conduct clearly meets the rational basis test.

Barrow III should have followed this Court's precedents and not applied the law of the case doctrine to perpetuate the erroneous standard announced in *Barrow I*.[10]

The procedural history of this case underscores a fundamental problem associated with the current analytical framework of qualified immunity, namely, how the court should treat preliminary constitutional determinations made on the basis of presumed facts when it is later determined by the jury that the actual facts are materially different from the presumed facts.

In light of *Barrow III*'s admission that the law was not clearly established and its erroneous application of the doctrine of law of the case to prevent Smith from urging his defense of qualified immunity, this Court should grant Smith's petition in order to clarify the meaning and proper application of "clearly established law" and to establish the proper relationship between a pre-trial determination of a Constitutional question in a qualified immunity appeal and the application of the law of the case doctrine.

---

[10] This Court is not bound by the law of the case. *Christianson*, 486 U.S. at 817.

III. THE DECISION BELOW APPLIES THE WRONG LEGAL STANDARD FOR AWARDING ATTORNEY'S FEES AND FOR ANALYZING RULE 68 OFFERS OF JUDGMENT, THUS THWARTING RULE 68's PURPOSE OF ENCOURAGING SETTLEMENT.

The Court should grant Smith's petition in order to address three important and interrelated legal issues regarding attorney's fees and offers of judgment. The first issue concerns the district court's conclusion that it was prohibited from reducing Barrow's fee award for time spent pursuing unreasonable and unsuccessful motions.

The second issue concerns the district court's error in shifting the burden of proof regarding attorney's fees. The district court erroneously awarded attorney's fees to Barrow's counsel even though the court's factual findings established that Barrow had not met her burden of proof. The district court's error regarding these two legal issues directly affected the issue of whether Smith's Rule 68 offer of judgment was effective.

The final issue concerns the district court's erroneous decision to disregard its own factual findings so as to thwart the effectiveness of Smith's Rule 68 offer of judgment. The district court initially concluded that Smith's offer of judgment was, according to its own calculations, effective. The district court then erroneously shifted the burden of proof to Smith and denied Smith the benefit of his effective offer of judgment. This Court should grant Smith's

petition in order to clarify the appropriate legal standard to apply to these issues relating to attorney's fees and Rule 68 offers of judgment so as to further the important public policy of ensuring the just, speedy and inexpensive resolution of civil disputes. *See* 28 U.S.C. § 471.

This case could have and should have been settled long ago. In a case in which her actual damages were $15,455, Barrow could have early on accepted Smith's offers of judgment and been made whole. Instead, she decided to litigate. The costs to the parties and to the judicial system have been enormous. By granting Smith's petition, this Court can clarify the law in such a way as to ensure the just, speedy and inexpensive resolution of future civil disputes.

A. Barrow Was Awarded Fees for Unreasonable Activities.

The lower court erred when it concluded that it could not reduce Barrow's award of attorney's fees for the time her lawyers spent pursuing unreasonable and unsuccessful motions, but could only reduce the award based on unsuccessful claims.

The lower court's ruling is erroneous because it encourages plaintiffs to engage in wasteful litigation tactics, particularly where an award of attorney's fees for those wasteful activities has a direct impact on whether an offer of judgment is effective. The Fifth Circuit compounded the lower court's legal error by

applying the wrong standard of review. The legal issue – whether a district court has the authority to reduce an award of attorney's fees for time spent on unreasonable and unsuccessful motions – should have been reviewed de novo. Instead, the Fifth Circuit applied the erroneous and deferential abuse of discretion standard.

Section 1988 permits district courts to award prevailing parties a "*reasonable attorney's fee.*" 42 U.S.C. § 1988 (emphasis added). The fee applicant bears the burden of establishing entitlement to a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In *Hensley*, this Court addressed a district court's discretion to award or reduce attorney's fees when the plaintiff has had partial or limited success on his or her claims. *Id.* at 436. This case raises the question of whether district courts have discretion to reduce attorney's fees for time spent on unreasonable and unsuccessful motions. The district court held that it was not allowed to reduce a fee award for time spent on unreasonable and unsuccessful motions, but only on unsuccessful claims. App. 67-68.

In a pre-trial review of the Barrow's fee request, Judge Sanders concluded that Barrow's counsel filed numerous irrelevant and unsuccessful motions which took up most of the court's docket sheet and had done nothing to further Barrow's claims. App. 253-254. Judge Sanders concluded that Barrow's counsel should not be awarded fees for fifteen irrelevant and unsuccessful motions. *Id.* The district court did not disturb Judge Sanders' factual findings, but erroneously concluded

that it was required by *Hensley* to award fees for time spent on irrelevant and unsuccessful motions.

The Fifth Circuit's approval of the district court's legal conclusion creates a split among the United States Courts of Appeals on an important issue in civil rights litigation that has not been, but should be decided by this Court. Section 1988 only permits the awarding of fees for time "reasonably expended on the litigation." *Hensley*, 461 U.S. at 433. Numerous Courts of Appeals and district courts have reduced or approved of the reduction of attorney's fees for specific tasks based on the reasonableness of the activity. *See, e.g., Hotel & Rest. Employers Local 25 v. JPR, Inc.*, 136 F.3d 794, 800 (D.C. Cir. 1998); *Luciano v. Olsten Corp.*, 109 F.3d 111, 117 (2d Cir. 1997); *Sands v. Runyon*, 28 F.3d 1323, 1333 (2d Cir. 1994); *Jacobs v. Mancuso*, 825 F.2d 559, 561-62 (1st Cir. 1987); *United States v. Metro. Dist. Comm'n*, 847 F.2d 12, 16 (1st Cir. 1988).

The district court's holding that, as a matter of law, it could not reduce an award of attorney's fees for time spent on unreasonable and unsuccessful motions creates a perverse incentive for plaintiffs' attorneys to engage in wasteful litigation tactics. This Court should grant Smith's petition for writ of certiorari in order to correct this erroneous decision.

B. Barrow Did Not Meet Her Burden of Proof on Her Fee Request.

The district court found that the scale of the errors in the fee records "calls into question the accuracy of Barrow's entire fee application and its ability to rely on the accuracy of the records is materially compromised." App. 65. Judge Sanders concluded that Barrow's fee application "shocked the conscience of the court" and should be denied entirely. App. 248-251. Judge Lindsay also found that fee applications submitted by Barrow's attorney were "exorbitant." App. 249-250.

Despite the findings of three separate judges, all of which call into serious question the validity and reliability of Barrow's attorney fee records, the district court awarded Barrow fees which totaled more than forty-one times the amount of Barrow's actual damages.

The burden of proving entitlement to fees under Section 1988 is on the fee applicant. *Hensley*, 461 U.S. at 437; *see also id.* at 441 (Burger, C.J., concurring) (prevailing parties must provide more evidence that a client might need because there is no relationship of trust and confidence between adversaries); *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1210 (10th Cir. 1986) ("It remains counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero."); *United Slate, Tile & Composition v. G&M Roofing*, 732 F.2d 495, 502 n.2 (6th Cir. 1984).

Barrow did not meet her burden of proof in seeking attorney's fees. The Fifth Circuit's failure to correct the error of the district court encourages plaintiffs' attorneys to keep inaccurate, insufficient, misleading and potentially fraudulent billing records and merely face a percentage reduction of their overall exorbitant request. "Congress did not intend to foster such gamesmanship when it enacted the Civil Rights Attorney's Fees Award Act of 1976." *Fair Housing Council v. Landow*, 999 F.2d 92, 98 (4th Cir. 1993).

Judge Sanders found Barrow's fee application was the most unreasonable application he had reviewed in 25 years on the district bench; that it was "so excessive that it shocks the conscience of the Court"; that the billing records were unreliable and difficult to analyze because of excessive block-billing;[11] and that certain alterations in the billing records raised concerns of "purposeful concealment." App. 257-258.[12]

Judge Fitzwater found that Barrow's counsel's block-billing was so excessive that it prevented the trial court from adequately assessing the reasonableness of

---

[11] *See* App. 242, 249-250, 254-258.

[12] Judge Sanders also found that Bundren sought fees for hours that were unproductive, excessive and unnecessary. App. 256. Judge Sanders noted that Bundren should have been aware of the excessiveness of his fee requests because of Judge Lindsay's prior findings in *Williams v. Kaufman County*. App. 249-250.

the fee request.[13] He also found that there were numerous unexplained errors in the billing records and that the scale of the errors in the records called into question the accuracy of Barrow's entire fee application and "*its ability to rely on the accuracy of the records is materially compromised.*" App. 65 (emphasis added). Judge Fitzwater noted that if Barrow's lawyer actually worked the hours his records reflect then he worked *an inhuman number of hours*. App. 62.

The Fifth Circuit ignored the factual findings of Judges Fitzwater, Sanders and Lindsay when it affirmed the award of attorney's fees. Considering the factual findings by these three district court judges, Barrow did not meet her burden of proof in regard to attorney's fees. Barrow's fee application gives every indication that her attorney "intended to submit an outrageously excessive fee petition in the hope that the district court would at least award some, preferably high, percentage of the requested fees." *Landow*, 999 F.2d at 98.

---

[13] App. 51-54, 70, 72, 74, 77, 79 ("cannot accurately determine"; "the court cannot determine, *inter alia*, the reasonableness of the time"; "make it impossible to know"; "impossible to conduct meaningful review"; "prevents the court from determining"; "impossible due to [...] block billing"; "precludes an exact determination").

C. The District Court Departed From Well-Established Principles of Law in Analyzing Smith's Offer of Judgment.

Despite finding that Smith's offer of judgment exceeded Barrow's recovery, the district court improperly shifted the burden of proof away from Barrow and onto Smith in order to avoid the application of Rule 68. The district court's analysis violates the specific terms of Rule 68 as well as the policies that underlie it. No other court has analyzed Rule 68 in this manner. The district court's decision and the Fifth Circuit's approval of that decision undermine the purpose of Rule 68 and radically depart from the usual course of judicial proceedings.

"Rule 68 provides that if a timely pretrial offer of settlement is not accepted and 'the judgment finally obtained by the offeree is not more favorable than the offer, the offerree must pay the costs incurred after the making of the offer." *Marek v. Chesny*, 473 U.S. 1, 5 (1985). "The plain purpose of Rule 68 is to encourage settlement and avoid litigation." *Id.* Rule 68 "expresses a clear policy of favoring settlement of all lawsuits." *Id.* at 10.

At a very early state of the case, Smith made an offer of judgment in the amount of $100,000. App. 97. When the district court compared Smith's $100,000 offer of judgment with Barrow's total recovery (jury award plus attorney's fees and costs as of the date of the offer of judgment), *the trial court found that Barrow fell "$6,287.56 short of the $100,000 threshold."*

App. 98 n.30 (emphasis added).[14] Despite finding that Barrow's total recovery did not meet or exceed Smith's offer of judgment, the district court chose not to apply Rule 68 based on irrelevant and erroneous considerations. The district court's approach undermines the purpose of Rule 68.

The district court refused to apply the strict terms of Rule 68 because of problems with the records submitted by Barrow's attorneys. The district court disregarded its own calculations and concluded that "it should not apply the percentage cuts according to a methodology that would trigger the preclusive effect of Rule 68." App. 98. Since the burden of proof regarding attorney's fees is on the fee applicant, it was clearly wrong for the district court to make an exception to Rule 68 based on the problems with Barrow's attorney's records.

The district court's erroneous application of Rule 68 was based on flawed considerations. First, the district court declined to apply its percentage cuts to the pre-offer portion of the fee application because its reductions were "rough percentages." App. 99. The reason its reductions were rough percentages was because of the pervasive flaws and errors in Barrow's fee application. By giving Barrow's counsel the benefit

---

[14] Barrow's total recovery as of the date of the offer of judgment is actually less because the district court used an incorrect calculation for prejudgment interest. Using the correct prejudgment interest, *Barrow was actually $8,886.68 short of the $100,000 threshold.*

of the doubt, the district court improperly shifted the burden of proof away from Barrow and onto Smith.

Next, the district court used the wrong rates for analyzing the offer of judgment. Barrow's attorneys sought fees for work as far back as 1998. The offer of judgment was made in 2001. The district court analyzed the offer using 2005 rates. App. 98. Rule 68 cannot effectively encourage settlement if, when determining the effectiveness of the offer, attorney's fees are calculated based on post-offer rates. Just as this Court has recognized that post-offer costs should not be included when calculating the effectiveness of the offer, post-offer rates for the attorney's fees should not be used. *See Marek*, 473 U.S. at 7.

Finally, the district court provided "credits" to Barrow for time that Barrow did not claim in her fee application. The district court reasoned that it would not have cut all of the time unclaimed by Barrow's attorneys and, thus, it would be inequitable to apply Rule 68. App. 99-100. The district court's analysis is flawed for two reasons: First, the district court cannot award Barrow for time she does not claim in her fee application. The burden of proof is on Barrow to prove her entitlement to fees, not on Smith to disprove her entitlement to fees she did not claim. Second, the reason Barrow eliminated much of this unclaimed time from her fee application is because Smith presented evidence that the claimed hours appeared to be fraudulent. As Judge Sanders noted, the records raised concerns of "purposeful concealment." App. 257-258. The district court should not have rewarded

Barrow for withdrawing claims which appear to have been improper.

The district court's analysis effectively shifted the burden of proof and gave the benefit of the doubt to Barrow. Counsel for Smith has searched opinions from every circuit and have not found a single case analyzed in this manner. The district court's analysis is based on the issuance of improper "credits" and a disregard of the fact that the fee applicant (Barrow) is the one who must shoulder the burden of proof regarding fees. This Court should grant Smith's petition for writ of certiorari in order to uphold the effectiveness of Rule 68 and in order to encourage the just, speedy and inexpensive resolution of civil disputes.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS P. BRANDT
Counsel of Record for Petitioner
Texas Bar No. 02883500
JOSHUA A. SKINNER
Texas Bar No. 24041927
ROBERT FUGATE
Texas Bar No. 00793099
FANNING HARPER & MARTINSON, P.C.
Two Energy Square
4849 Greenville Ave., Suite 1300
Dallas, Texas 75206
(214) 369-1300 Telephone
(214) 987-9649 Telecopier
Attorneys for Petitioner
Dr. Herman Smith

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-10123

KAREN JO BARROW,

Plaintiff-Appellee,
Cross Appellant,

versus

GREENVILLE INDEPENDENT
SCHOOL DISTRICT; ET AL.,

Defendants,

DR. HERMAN SMITH,

Defendant-Appellant,
Cross Appellee.

Appeals from the United States District Court
for the Northern District of Texas
(00-CV-913)

(Filed Oct. 23, 2007)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

GARWOOD, Circuit Judge:*

In the third appeal resulting from this case, defendant-appellant Dr. Herman Smith (Smith) challenges the district court's judgment entered after a jury verdict in favor of plaintiff-appellee Karen Jo Barrow (Barrow). Smith presents three arguments against the judgment, contending that: first, the district court erroneously applied a heightened level of scrutiny in analyzing the constitutionality of the state action at issue in this case; second, the district court erred in deciding to award Barrow attorneys' fees; and third, the district court erred when it ruled that Smith's $30,000.00 joint offer of judgment with codefendant Greenville Independent School District (GISD) and his later $100,000.00 offer, both made pursuant to Federal Rule of Civil Procedure 68, were ineffective to invoke Rule 68's provision requiring certain offerees to pay post-offer costs.

Barrow cross-appeals, arguing that the district court erred in determining the prevailing market rate for Barrow's attorneys and in making downward adjustments to Barrow's attorneys' hours.

For the reasons set forth below, we affirm.

---

* Pursuant to 5TH CIR. R. 47.5 the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

FACTS AND PROCEEDINGS BELOW[1]

During the summer of 1998, Barrow was employed as a teacher by GISD, where Smith was then a superintendent. Barrow's children were enrolled in the Greenville Christian School, a private religious school.

That summer, an assistant principal position at a middle school became open at GISD, and Barrow applied for the job. In May of 1998, at Smith's direction, a senior school official approached Barrow and asked whether she would move her children to the public schools so that she could be considered for the assistant principal position. Barrow responded that she was very much interested in becoming an assistant principal, but she would not remove her children from their private religious school.

After Barrow's name was included in the applicant pool, Smith directed the assistant superintendent for personnel to see if Barrow would move her children to public school. She would not, and GISD hired another person for the assistant principal position. Smith later told Barrow and her husband that he had not recommended Barrow for the position because their children attended private school.

---

[1] We have previously chronicled the facts and proceedings of this case. *See Barrow v. Greenville Indep. Sch. Dist. (Barrow II)*, 480 F.3d 377, 379-80 (5th Cir. 2007), *cert. denied*, U.S. LEXIS 11047 (U.S. Oct. 1, 2007) (No. 07-59).

Barrow filed this suit in 2000 under 42 U.S.C. § 1983, alleging that Smith violated her constitutional rights by refusing to consider her for the assistant principal position because Barrow would not move her children from the private Christian school into a GISD school.

Smith moved for summary judgment based on his assertion that he was entitled to qualified immunity, permitting the court to assume for the purpose of his motion that he decided not to promote Barrow at least in part because she chose to educate her children in a private school. The district court granted Smith's motion, finding him entitled to qualified immunity after concluding that the law was not clearly established regarding public school employees' constitutional right to send their children to a private school. We reversed the district court's grant of summary judgment to Smith in this case's first appearance before this court. *Barrow v. Greenville Indep. Sch. Dist. (Barrow I)*, 332 F.3d 844 (5th Cir. 2003).

After this court decided *Barrow I*, the district court and parties agreed to refer the case for non-binding arbitration concerning the issue of attorneys' fees. On July 27, 2004, the district court judge presiding over the non-binding arbitration recommended that Barrow's fee request be denied in its entirety or, alternatively, drastically reduced.

At trial, Barrow asserted two claims against Smith: a religious rights claim and a parental rights

claim. On March 25, 2005, after a two-week trial, the jury reached its verdict. It rejected Barrow's religious rights claim, but found in her favor on her parental rights claim. The jury awarded Barrow $15,455.00 in compensatory damages and $20,000.00 in punitive damages against Smith. Barrow lost all claims against GISD.

Barrow and Smith both filed post-judgment motions, but the district court denied all of these. On December 20, 2005, the district court awarded Barrow $631,293.00 in attorneys' fees and $22,775.22 in expenses and taxable court costs.

Smith filed notice of appeal on January 12, 2006. Barrow cross-appealed.

DISCUSSION

I. Level of Scrutiny

To withstand strict scrutiny, a state must show that its challenged action "necessarily relate[s] to a compelling state interest." *Kite v. Marshall,* 661 F.2d 1027, 1030 (5th Cir. 1981). Conversely, the rational basis test requires only that the challenged state action "rationally promote a legitimate governmental objective." *Id.* "A state action viewed under the rational basis banner is presumed to be valid," and the party challenging the state action must show that it is completely arbitrary. *Id.*

Smith argues on appeal that the district court erroneously applied strict scrutiny when it should

have used the rational basis test to analyze Barrow's parental rights claim. Specifically, he argues that because the jury rejected Barrow's religious rights claim, there was no justification for applying a level of scrutiny greater than rational basis. Under the rational basis test, Smith asserts, the district court should have entered judgment in his favor. We review constitutional questions *de novo*. *United States v. Perez-Macias,* 335 F.3d 421, 425 (5th Cir. 2003).

In *Barrow I,* we disagreed with the district court's conclusion that the law on public school employees' constitutional right to send their children to a private school was not clearly established, and reversed the district court's judgment. 332 F.3d at 846; *see id.* at 848 (stating that "the constitutional right of public-school employees to select a private-school education for their children was clearly established when Smith refused to consider Barrow for the position of assistant principal"). In reaching our decision to reverse in *Barrow I,* we relied heavily on two of this court's previous opinions: *Brantley v. Surles (Brantley I),* 718 F.2d 1354 (5th Cir. 1983), and *Fyfe v. Curlee,* 902 F.2d 401 (5th Cir. 1990). *See Barrow I,* 332 F.3d at 847-48 (discussing *Brantley I* and *Fyfe*).

In *Brantley I,* the plaintiff Brantley brought suit under 42 U.S.C. § 1983 against the superintendent of education and board of education in Montgomery County, Mississippi, alleging that they violated her constitutional rights to direct her child's education by firing her from her position as a public school

cafeteria worker "for the sole reason that her son attended a private academy rather than the local public school." 718 F.2d at 1355. Unlike in the present case, there was no suggestion that the plaintiff's decision to send her son to private school was based on religion; Brantley had transferred her son from a public high school to a private, segregated academy in hopes that he "would have a better chance of playing varsity sports at the academy." *Id.* at 1355-56. This court deemed that the decision to transfer Brantley's son to private school fell under the umbrella of the Constitution's guarantee of familial privacy, *id.* at 1359, but we recognized that, "[i]n the realm of public school employment, the court must balance the interests of the school employee with the interest of the state in promoting efficiency in the educational services which it provides through its school employees." *Id.* The panel explained, "The state may legitimately interfere with the constitutionally protected conduct of a public school employee whenever that conduct materially and substantially impedes the operation or effectiveness of the educational program." *Id.* Accordingly, the judgment was reversed and the case remanded to the district court to determine, first, whether Brantley's son's enrollment in private school "materially and substantially interfered with the operation or effectiveness of the educational program" at Brantley's school. *Id.* The panel directed the district court to also determine "whether the protected activity played a substantial part in the board's discharge decision," and that if it did, whether Brantley "would have been fired anyway for reasons

completely independent of the private school enrollment decision." *Id.*

Brantley's case appeared before this court again in *Brantley v. Surles (Brantley II),* 765 F.2d 478, 479 (5th Cir. 1985) (per curiam), after the district court determined on remand that Brantley was fired from her job for nondiscriminatory reasons. We reversed and remanded again after concluding that the ostensible reason for Brantley's discharge – a disrespectful remark made about a board of education member – could not have been the basis for her discharge. *Id.* at 481-82. But we agreed with the district court's determinations that the private school education of Brantley's son played a substantial part in the board's decision to fire Brantley, and that there was "no evidence that the enrollment of Brantley's son in the private school materially and substantially interfered with the operation or effectiveness of the educational program at the public school." *Id.* at 480. The local superintendent of education had testified that interracial dissension *might* occur after Brantley's son withdrew to enroll in a private, segregated school, but the superintendent's belief was unsupported "by any objective evidence." *Id.*

In *Fyfe v. Curlee,* the plaintiff Fyfe was a secretary to a public elementary school principal when she enrolled her daughter in a private, all-white academy. 902 F.2d at 402. Like the plaintiff in the *Brantley* cases, Fyfe's reasons for selecting a private education for her child were unrelated to religion; she and her husband were concerned about her daughter's

experiences with another white child at the public school and thought that her daughter would be happier at the private academy. *Id.* Around the time of Fyfe's decision to enroll her daughter in private school, black citizens began boycotting local businesses, primarily "to put pressure on the school system to increase the number of black teachers and administrators." *Id.* The local school superintendent encouraged Fyfe to resign. *Id.* When Fyfe refused, he transferred her to a newly created, undesirable job. *Id.* at 402-03. Fyfe filed suit under section 1983, alleging retaliation against her for exercising her constitutional right to enroll her daughter in private school. *Id.* at 402. This court concluded that, by transferring her to a menial position, the school district had violated Fyfe's First and Fourteenth Amendment rights. *Id.* at 405. The question then became whether the record revealed that Fyfe's "protected conduct of enrolling her child in a private school was detrimental to the effecient [sic] operation of the [ ] school system." *Id.* We made clear that this analysis – which requires balancing the interest of the school employee with that of the state in promoting efficiency in educational services – "is to be conducted by the court as a matter of law, not fact," *id.*, and that the defendant state shoulders the burden to show that the child's enrollment in private school harms the public school system. *See id.* at 406 (because defendant had failed to demonstrate that its interference with the plaintiff's parental rights was necessary for the efficient operation of the school system, plaintiff prevailed as a matter of law). We

concluded that the state had "failed to demonstrate that its action in reassigning Mrs. Fyfe was necessary to the smooth and efficient operation of the school system." *Id.* at 406. We explained:

> "[T]he school district produced no evidence of substantial interference with its effectiveness as a result of Mrs. Fyfe's enrollment of her daughter in private school. . . . The record is completely silent on any effect Shannon Fyfe's move to the private school had on the appellee school district. This court held in the second appeal in *Brantley* that belief alone of such interference 'unsupported by any objective evidence' is not sufficient to demonstrate material interference to carry the balancing test for the school district. *Brantley v. Surles,* 765 F.2d 478, 480 (5th Cir. 1985)." *Id.* at 405.

Our analysis was unchanged by the fact that a boycott of local businesses had been threatened in case a public school employee enrolled his or her child in a private, segregated school. There was no evidence that this possibility of a boycott was related to Fyfe, or that it impeded the school system's operation:

> "No causal link was ever made in the district court between the threatened school boycott and Mrs. Fyfe's action. When asked on cross-examination whether she was aware that one of the demands of the boycotting group was 'that the school system not employ anybody who does now or ever has had a child in a private segregated academy,' the plaintiff

> responded that she had read about that in the paper. The mere fact that this demand was made on the school system however cannot be sufficient to demonstrate that Mrs. Fyfe's enrollment of her daughter at a private school caused substantial and material interference with the school system's operation and effectiveness." *Id.* at 405.

When the instant case first appeared before a panel of this court in *Barrow I,* we relied on the *Brantley* and *Fyfe* cases for certain principles. For example, we stated in *Barrow I* that those cases clarified that "public-school employees like Barrow have a protected right to educate their children in private school," 332 F.3d at 848, and that this public school employee right was clearly established when Smith refused to consider Barrow for the assistant principal position. *Id.* Most important to the instant appeal, in *Barrow I,* we relied on the *Brantley* and *Fyfe* cases in declaring that a "state cannot take an adverse employment action against a public-school employee for exercising this right [to educate his or her child in private school] unless it can prove that the employee's selection of private school materially and substantially affects the state's educational mission." *Id.*

Because we had unequivocally declared in *Barrow I* the state's burden to show Barrow's enrollment of her children in private school caused detriment to its educational mission, we found it unnecessary to address in the opinion from that appeal the question of the degree of scrutiny to be applied to a state's

adverse action against a public school employee for sending his or her child to a private school. *Id.* at 849 n. 20. We found it to be an unnecessary analysis because, regardless of the level of scrutiny applied, it was still incumbent on the defendant to show that Barrow's selection of school for her children had an injurious effect on the operations of the public school system that employed her. If the defendant failed to meet that burden, its defense would be a nonstarter. We explained:

> "[W]e express no opinion on the particular degree of scrutiny a state action must undergo to withstand a challenge to its constitutionality in a case like this one. Instead, we simply recognize that the state cannot strip its school employees of the right to choose a private-school education for their children without proving that the unfettered exercise of this right will undermine a state interest. Barrow and amici curiae argue that any state action that interferes with this right is subject to strict scrutiny. We need not take up this question today. In the absence of objective proof that Barrow's choice of a private-school education for her children will undermine a state interest the district's patronage policy fails *irrespective of the degree of scrutiny applied.*" *Id.* (emphasis added).[2]

---

[2] We likewise made clear in *Barrow I* that we did not need to decide whether the right asserted by the plaintiff fell under the First Amendment or the Due Process Clause of the Fourteenth

(Continued on following page)

Having found that Barrow asserted a constitutionally protected right, and that Smith interfered with that right, Barrow would prevail if the defendants did not show that the interference was required for the smooth and efficient operations of the school system. This was the effect of our reliance in *Barrow I* on *Brantley* and *Fyfe*.

Smith argues that requiring defendants in a case with facts such as these to show that the public school employee's choice of a private school education for their children impeded with the public school system's operations constitutes strict scrutiny of the defendant school board's actions. Smith asserts that Barrow is not entitled to this degree of scrutiny without a religious component to her claim, and Smith contends that any possibility of such a religious component was eradicated when the jury found that Barrow's religious rights were not violated.

One might argue that because the jury found that religious rights were not violated, there is no religious component in this case. In this case's second appearance before this court, *Barrow v. Greenville Independent School District (Barrow II)*, 480 F.3d 377

Amendment because, regardless, the defendant had the burden of showing that the enrollment of Barrow's children in private school impeded school operations. *See* 332 F.3d at 846-47 (considering together three claims asserted by Barrow because "at bottom all aver that Barrow, a public-school employee, has a constitutionally-protected right to select a private-school education for her children").

(5th Cir. 2007), *cert. denied,* U.S. LEXIS 11047 (U.S. Oct. 1, 2007) (No. 07-59), Barrow unsuccessfully challenged the district court's grants of summary judgment in favor of GISD. 480 F.3d at 380. While the *Barrow II* opinion largely focuses on Barrow's argument that Smith was a policymaker and that therefore GISD was liable for his unconstitutional conduct, *see id.* at 380-82, we also addressed Barrow's contention that the district court improperly granted summary judgment in favor of GISD on her religious discrimination claim. *See id.* at 382-83. We agreed with the district court that Barrow had not produced sufficient evidence to show that GISD's employment practices result in a significant disparity between those who are religious and those who are not. *Id.* at 383. We stated further:

> "The record evidence, read in the light most favorable to Barrow, supports the district court's conclusion that Smith did not recommend Barrow because her children were not attending the public schools, not because her children were attending a religious school. There is no probative evidence that Smith's decision had any impact upon any First Amendment-protected freedom." *Id.*

Assuming, then, that *Barrow II* removes the possibility of a religious element to Barrow's claims, Smith relies on several cases for the proposition that the appropriate level of scrutiny to be applied to state actions interfering with parental rights – where there is no religious element – is rational basis. In particular,

Smith cites the United States Supreme Court's decision in *Wisconsin v. Yoder,* 92 S.Ct. 1526 (1972), and two previous opinions of this court: *Kite v. Marshall,* 661 F.2d 1027 (5th Cir. 1981), and *Littlefield v. Forney Independent School District,* 268 F.3d 275 (5th Cir. 2001).

In *Kite v. Marshall,* a case decided before the *Brantley* cases and *Fyfe v. Curlee,* plaintiffs challenged a regulation requiring that any high school student who attended certain summer sports training camps be suspended temporarily from varsity athletic eligibility. 661 F.2d at 1028. Various reasons supported the rule: "the need to control over-zealous coaches, parents and communities, the achieving of a competitive balance between those who can afford to attend summer camp and those who cannot, the avoidance of various excessive pressures on students, and the abrogation of the use of camps as recruiting mechanisms." *Id.* at 1030. The district court declared the rule unconstitutional, but this court reversed, finding that it did not violate either the due process clause or equal protection clause of the Fourteenth Amendment. *Id.* at 1028. We determined that the rule did not implicate any fundamental constitutional right, and that therefore the appropriate level of scrutiny was rational basis. *Id.* at 1029, 1030.

In *Littlefield v. Forney Independent School District,* individual students and parents of students challenged a district-wide mandatory uniform policy. 268 F.3d at 279. Specifically, the parents contended that the compulsory uniform policy violated their

constitutional right to control their children's education in violation of the Fourteenth Amendment. *Id.* at 282. The parents argued that their right to control their children's education was a fundamental right and that therefore the court should apply strict scrutiny in analyzing the school uniform policy. *Id.* at 288. We disagreed, declining to find a "fundamental right for parents to control the clothing their children wear to public schools."[3] *Id.* at 289. We analyzed the asserted parental right under a rational-basis standard. *Id.*

While both *Kite* and *Littlefield* employ a rational basis standard to analyze state interference with parental rights, those cases are distinguishable from the instant case. *Kite* and *Littlefield* address policies relating to what goes on at the public school: ineligibility to participate in school varsity athletics if certain types of summer sport camps are attended, and a district-wide compulsory school uniform policy. The defendant Smith's stance toward Barrow's decision to educate her children in private school does not in any way relate to what occurs at a GISD-operated public school. Stated differently, a rule requiring

---

[3] We explained:

"While Parents may have a fundamental right in the upbringing and education of their children, this right does not cover the Parents' objection to a public school Uniform Policy. It has long been recognized that parental rights are not absolute in the public school context and can be subject to reasonable regulation." 268 F.3d at 291.

public school employees to enroll their children in public schools is simply more invasive of parental rights and less clearly tied to the public school's management of its students and educational program than the *Kite* and *Littlefield* rules addressing school varsity athletics eligibility and school uniforms. *Kite* and *Littlefield* are distinguishable, and they are not controlling in this case.

Nevertheless, we acknowledge that it is possible to argue that without a situation akin to that in *Wisconsin v. Yoder,* 92 S.Ct. 1526, only rational basis – and not strict scrutiny – should be applied in evaluating a state action that imposes requirements on parental decisions regarding education. In *Yoder,* respondents had been charged, tried, and convicted of violating the State of Wisconsin's compulsory school-attendance law that required parents to send their children to attend public or private school until the children reached 16 years of age. 92 S.Ct. at 1529. The respondents, two members of the Old Order Amish religion and one member of the Conservative Amish Mennonite Church, had declined to send their 14 and 15 year-old children to public school after they completed the eighth grade, and the children were not enrolled in any private school, nor did they meet any applicable exception to the Wisconsin statute. *Id.* The United States Supreme Court stated:

> "[I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it

> must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Id.* at 1532.

The Court found that, in the respondents' case, enforcement of the compulsory school-attendance law after the eighth grade "would gravely endanger if not destroy the free exercise of respondents' religious beliefs," and the focus of its analysis thus turned to whether the state interest was sufficient to override the respondents' religious-based interest in declining to send their children to public school after the eighth grade. *Id.* at 1535. The Court made clear its analysis was more rigorous than the rational-basis test: "[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." *Id.* at 1542. The Court concluded that the State of Wisconsin was precluded from forcing the respondents to send their children to formal school until the age of 16 by the First and Fourteenth Amendments. *Id.* Thus, *Yoder* arguably supports Smith's contention that heightened scrutiny is appropriate only where the state action also adversely affects free exercise of religion, which the jury verdict in this case makes clear is no longer at issue.

Even if we agree with Smith, however, that *Yoder* represents the only possible basis for a heightened level of scrutiny in cases dealing with state interference of parental rights, it remains the school district's burden to show that Barrow's decision to send her children to private school had a materially adverse effect on the public school district. This is so because *Barrow I* renders that the law of the case.

Under the law of the case doctrine, "[o]nce a panel of this court has decided an issue of law or fact, the decision continues to govern all subsequent stages of the same case." *Free v. Abbott Labs., Inc.*, 164 F.3d 270, 272 (5th Cir. 1999). This holds true to explicitly decided issues as well as "everything decided 'by necessary implication.'" *In re Felt*, 255 F.3d 220, 225 (5th Cir. 2001) (quoting *Browning v. Navarro*, 887 F.2d 553, 556 (5th Cir. 1989)). The law of the case doctrine is "necessary to bring finality to litigation." *Free*, 164 F.3d at 272. Application of the doctrine is discretionary, but barring exceptional circumstances this court will generally decline to revisit an issue previously decided by another panel in the same case. *Id.*; *see also United States v. Slanina*, 359 F.3d 356, 358 (5th Cir. 2004) (per curiam) (noting that this court follows its prior decisions without re-examination unless, for example, the earlier decision was "dead wrong"). There are no such exceptional circumstances warranting our reconsideration of the panel's decision in *Barrow I*.

It is true that at the time of *Barrow I* we were faced with a summary judgment motion and therefore

had to give Barrow the benefit of the doubt on her religious rights claim, while subsequently the jury verdict and *Barrow II* took that claim out of consideration. However, it remains the law of the case that *Barrow I* relied on the *Brantley* and *Fyfe* cases, which – as we noted above -- did not have a religious element, and *Barrow I* expressly held that the requirements of those cases obtained regardless of the level of scrutiny and regardless of whether First Amendment religious rights or merely more general due process parental rights were involved. We held in *Barrow I* that those *Brantley* and *Fyfe* opinions were controlling, and the law of the case requires that we adhere to that prior holding herein.

II. Attorneys' Fees

Smith faults the district court for acting against the non-binding arbitration recommendation and awarding Barrow attorneys' fees under 42 U.S.C. § 1988.[4] Barrow, meanwhile, cross-appeals, contending that

---

[4] Subsection (b) of 42 U.S.C. § 1988, "Proceedings in vindication of civil rights," provides that in actions to enforce section 1983, a court "may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."

"Section 1988 'is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory.'" *Hopwood v. Texas*, 236 F.3d 256, 278 (5th Cir. 2000) (quoting *Farrar v. Hobby*, 113 S.Ct. 566, 578 (1992) (O'Connor, J., concurring)).

the district court's award of attorneys' fees was the result of improper reduction. We disagree with both parties and affirm the district court's award of fees.

As we have previously stated, "We cannot overemphasize the concept that a district court has broad discretion in determining the amount of a fee award." *Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 379 (5th Cir. 1990). While we review the award of attorneys' fees for abuse of discretion, "[u]nderlying questions of fact are reviewed for clear error." *Adams v. Unione Mediterranea di Sicurta,* 364 F.3d 646, 656 (5th Cir. 2004). Such subsidiary factual questions include determinations of "whether the reported hourly rate is reasonable and whether the reported tasks are duplicative or unrelated to the purposes of the law suit." *Associated Builders & Contractors of Louisiana, Inc.,* 919 F.2d at 379. The breadth of discretion accorded to the district court in awarding attorneys' fees is appropriate given that "[a]ppellate courts have only a limited opportunity to appreciate the complexity of trying any given case and the level of professional skill needed to prosecute it." *Hopwood v. Texas,* 236 F.3d 256, 277 (5th Cir. 2000); *see also Associated Builders & Contractors of Louisiana, Inc.,* 919 F.2d at 379 (stating that the district court's broad discretion is "'appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters'" (quoting *Hensley v. Eckerhart,* 103 S.Ct. 1933, 1941 (1983))).

The district court thoroughly evaluated and considered the propriety of the attorneys' fees award. In its memorandum opinion and order dated December 20, 2005, the district court discussed for over fifty pages its reasons for the attorneys' fees award. Given the district court's impressively careful and thorough consideration of this issue, we cannot conclude that the court abused its discretion. *Cf. Associated Builders & Contractors of Louisiana, Inc.*, 919 F.2d at 379 (declaring the abuse of discretion standard possible only where the district court has provided a concise and clear explanation for its award of fees).

III. Offers of Judgment

Lastly, Smith also contends that the district court erred when it ruled that his Rule 68 offers of judgment were ineffective. At issue are two offers of judgment: one made jointly by codefendants Smith and GISD for $30,000.00, and one by Smith only for $100,000.00. Smith argues that in regards to the $30,000.00 joint offer, the district court should have compared the offer to the recovery Barrow obtained against both Smith and GISD, which Smith argues would make the offer amount greater than Barrow's recovery because the amount Barrow was ordered to pay GISD – or $14,492.65 – should be subtracted from her recovery of $35,455.00 from Smith. In relation to his $100,000.00 offer, Smith argues that the district court incorrectly concluded that Barrow's attorneys' fees and court costs, together with her recovery, were such that they defeated the larger

offer. Both of Smith's arguments result in his conclusion that he should not be liable for Barrow's post-offer costs or fees and that he should be able to recover his costs from Barrow.

Federal Rule of Civil Procedure 68 "permits defendants in an action to present an offer of judgment to the plaintiffs at any time more than 10 days before trial; the plaintiff has 10 days in which to unconditionally accept the offer." *Ramming v. Natural Gas Pipeline Co. of Am.*, 390 F.3d 366, 370 (5th Cir. 2004). Rule 68 states in pertinent part:

> "At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." FED. R. CIV. P. 68.

The "severe consequences which may result post-trial from rejection of pre-trial offers" supports Rule 68's purpose of "encouraging settlement" and "discouraging protracted litigation." *Ramming*, 390 F.3d at 370 n.2.

We review the district court's interpretation of Federal Rule of Civil Procedure 68 *de novo*. *Basha v. Mitsubishi Motor Credit of Am., Inc.*, 336 F.3d 451, 453 (5th Cir. 2003). "The district court's findings

regarding the factual circumstances under which Rule 68 offers and acceptances are made, however, are reviewed under the clear error standard." *Id.*

We agree with the district court's determination that Smith's two offers of judgment were ineffective. His argument that the amount Barrow paid to GISD should be subtracted from her recovery from Smith in analyzing the $30,000.00 offer is incorrect; Barrow did not recover anything against GISD, and thus there is nothing to consider in relation to GISD in determining Barrow's total recovery. Further, in relation to Smith's $100,000.00 offer of judgment, it is true that if one reduced Barrow's attorneys' fees enough at the time that he made the offer, one could say that Barrow did not recover enough to defeat Smith's second offer of judgment. However, such a result would require a *substantial* reduction of these fees. The district court did not consider the excessiveness of hourly rates for each attorney to be evenly spread between the early and later years of this case. It was not clear error or an abuse of discretion for the district court to determine such a substantial reduction of fees at the time of the $100,000.00 offer would be inappropriate.

CONCLUSION

For the foregoing reasons, we affirm the district court's judgment.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-10123

D.C. Docket No. 3:00-CV-913

KAREN JO BARROW

Plaintiff-Appellee-Cross Appellant,

v.

GREENVILLE INDEPENDENT SCHOOL DISTRICT; Et Al

Defendants

HERMAN SMITH, Dr

Defendant-Appellant-Cross Appellee

Appeals from the United States District Court for the Northern District of Texas, Dallas.

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JUDGMENT

(Filed Oct. 23, 2007)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: NOV 28 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-11151

KAREN JO BARROW,

Plaintiff-Appellant,

versus

GREENVILLE INDEPENDENT
SCHOOL DISTRICT; ET AL,

Defendants,

GREENVILLE INDEPENDENT
SCHOOL DISTRICT,

Defendant-Appellee

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:00-CV-913

(Filed Feb. 26, 2007)

Before JOLLY, HIGGINBOTHAM, and DENNIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The district court held that the superintendent of defendant Greenville Independent School District did

not act as a policymaker for the district in refusing to recommend a teacher for promotion. Under Texas law, a school district's board of trustees can hire or promote only persons recommended by the superintendent. Yet the Board has the power to hire and fire the superintendent. Concluding that under Texas law the Board retains the ultimate policymaking authority for hiring and promotion, we affirm.

I

Karen Jo Barrow was a teacher in the Greenville Independent School District. When the Assistant Principal position at Greenville Middle School became available, the future principal of the middle school encouraged Barrow to apply. Barrow was interested in and qualified for the position.

At the direction of Dr. Herman Smith, superintendent of GISD, a senior school official asked Barrow if she would move her children from a private Christian school to public school so that Barrow could be considered for the job. Barrow affirmed her interest in the job but stated she wouldn't sacrifice her children's religious education.

After Barrow's name was placed in the pool of applicants, Dr. Smith directed Assistant Superintendent for personnel, William Smith, to see if Barrow would be willing to move her children to public school. She was not, and another person was hired for the job. Later, Smith told Barrow and her husband that he didn't recommend Karen Jo for the job

because her children went to private school; he also stated that Barrow had "no future" at GISD while that was the case.[1]

Barrow sued Smith and GISD in federal district court under § 1983, claiming a denial of constitutional rights, disparate impact and treatment in violation of Title VII, and several violations of state law. GISD moved for summary judgment, which the court granted in part and denied in part. Regarding § 1983, the court concluded that the GISD Board of Trustees, not Smith, was the policymaker because Smith only recommended candidates while the Board had final approval. The district court also held that the circumstance that the Board rubber-stamped Smith's recommendations was legally irrelevant and that a patronage requirement was not custom or practice establishing GISD policy. It denied summary judgment, however, finding that Barrow sufficiently alleged that GISD actually knew of Smith's behavior, knowledge it concluded was sufficient to establish GISD policy if proved.[2] The court granted summary judgment for GISD on the Title VII claims, except as to Barrow's reasonable accommodation claim,[3] concluding that the failure to promote was due to

---

[1] GISD disputes many of these facts, but on a motion for summary judgment we resolve disputed facts in favor of the non-moving party, here Barrow.

[2] *See Bennett v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984).

[3] GISD failed to move for summary judgment as to that claim.

Barrow's choice to put her children in private school, not because of her religion or the religious nature of the private school she chose, and that Barrow presented no evidence of disparate impact upon constitutionally protected conduct. The court denied summary judgment on the state law claims, except as to the claim for injunctive relief.

The remaining claims were tried to a jury, which found against Smith[4] and for GISD, ordering Smith to pay Barrow about $35,000 in damages and $650,000 in fees and costs. All parties filed post-judgment motions, which the court denied. Barrow appeals the court's grant of summary judgment to GISD, contending that Superintendent Smith was a policymaker. She asks that we reverse and render judgment in her favor and against GISD given the jury finding that Smith violated her rights.[5] She also appeals the summary judgment granted to GISD on the Title VII claim of disparate impact.

---

[4] Early in the case, the district court granted summary judgment for Smith after concluding he had qualified immunity. Barrow appealed. GISD filed its motion for summary judgment, and the court ruled on the motion during Barrow's appeal. We reversed the court's grant to Smith of qualified immunity, *see Barrow v. Greenville Indep. Sch. Dist.*, 332 F.3d 844 (5th Cir. 2003), hence Smith re-entered the case and was a defendant at the trial of Barrow's remaining claims.

[5] In a footnote, GISD states that it does not concede a violation of Barrow's rights, but it makes no argument to the contrary. Because we affirm that Smith was not a policymaker, we do not address the argument.

II

A school district has no vicarious liability under § 1983. Rather, it is liable for the unconstitutional conduct of its policymakers, including persons to whom it has delegated policymaking authority in certain areas.[6] We review *de novo* the district court's conclusion that Smith was not such a policymaker here.[7]

We have examined before the policymaking authority of superintendents of independent school districts in Texas. In *Jett v. Dallas ISD,*[8] a school principal recommended to the superintendent, who had final approval over the matter under ISD policy, that a teacher/coach be transferred. The superintendent approved and ordered the transfer, unaware of the principal's discriminatory motive. The Board played no role. The teacher sued the principal and the ISD, but not the superintendent, arguing that his involuntary transfer was motivated by race and his exercise of First Amendment rights. A jury awarded damages against the principal and the ISD. We reversed the judgment against the ISD for want of a finding that the superintendent had policymaking authority for his relevant conduct.[9] The Supreme

---

[6] *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 689 (1978).

[7] *Baton Rouge Oil & Chem. Workers Union v. ExxonMobil Corp.*, 289 F.3d 373, 376 (5th Cir. 2002).

[8] 7 F.3d 1241 (5th Cir. 1993).

[9] Jett never argued that the principal was a policymaker.

Court granted certiorari to decide another issue, ultimately remanding for a determination of whether, under Texas law, the superintendent had "final policymaking authority in the area of employee transfers."[10]

The panel determined that, under Texas law, school boards make policy and superintendents administer. It pointed to Texas law giving the school board "*exclusive* authority to manage and govern the public free schools of the district,"[11] concluding that the superintendent's power to decide transfers was entirely delegated by the board, hence the board had

---

[10] The Supreme Court left the question to us:

> We decline to resolve this issue on the record before us. We think the Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine whether [the superintendent] possessed final policymaking authority in the area of employee transfers, and *if so* whether a new trial is required to determine the responsibility of the school district for the actions of Principal Todd in light of this determination. . . . We remand the case to the Court of Appeals for *it* to determine where final policymaking authority as to employee transfers lay in light of the principles enunciated by the plurality opinion in *Praprotnik* and outlined above . . . (emphasis added).

7 F.3d at 1244 (*citing Jett v. Dallas ISD*, 491 U.S. 701, 738 (1989)).

[11] TEX. EDUC. CODE § 23.26 (repealed and reenacted as amended in 1999 as § 11.051) (emphasis added).

authority to modify or eliminate that power, rendering it the policymaker.[12]

Here, however, a Texas statute directs ISDs to adopt a personnel policy giving superintendents "sole authority to make recommendations to the board regarding the selection of all personnel, except that the board may delegate final authority for those decisions to the superintendent. . . . If the board rejects the superintendent's recommendation, the superintendent shall make alternative recommendations until the board accepts a recommendation."[13] Hence the superintendent's power to *recommend* comes from the legislature, not from the board of trustees, although the board retains the power to accept or reject those recommendations and to fire the superintendent. Barrow argues that this structure gives policymaking authority over personnel decisions to both the Board and Smith because both must agree on candidates – and both have effective veto power over the other's candidates.[14]

---

[12] The court also stated that "[n]othing in the Texas Education Code purports to give the Superintendent any policymaking authority or power to make rules or regulations, whether as to . . . transfers *or otherwise*" (emphasis added). Because the statutory question here is different from that in *Jett*, and because the situation in *Jett* did not require a ruling on the policymaking authority of superintendents in all instances, this statement does not dictate the result here.

[13] TEX. EDUC. CODE § 11.163(a)-(b).

[14] Barrow makes three other, meritless arguments which are conflated with her primary, strong argument. First, she

(Continued on following page)

Standing alone, Barrow's argument has purchase because the superintendent has "sole authority" to recommend. But it cannot prevail against the backdrop of Texas's legislative scheme, which generally makes the board the policymaker and the superintendent the head administrator. Texas's system of bifurcating recommendation and approval authority over hiring and promotion neither gives the superintendent policymaking authority nor abrogates the board's general policymaking authority. Accenting this point in the matter of selecting school principals, the Texas legislature insists that the "board of trustees . . . shall adopt a policy for the selection of a campus principal that includes qualifications required for that position."[15] By its structure it is evident that

---

argues that GISD's rubber-stamping of Smith's recommendations renders him the *de facto* policymaker. The district court properly rejected this argument because the question is whether GISD had the *authority* to guide Smith's discretion, not whether it actually did so. *See Jett*, 7 F.3d at 1247 n.10 (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 129 (1988)). Second, she argues that GISD has a "custom and usage" of requiring teachers to put their children in public school. The district court rejected this argument for lack of evidence, and Barrow didn't appeal the ruling and does not now explain what sufficient evidence supports the claim. Third, Barrow briefly asserts that GISD is a policymaker for failing, to this day, to adopt a policy forbidding the superintendent from using the unlawful patronage practice. This turns *Monell* on its head. Although there is the argument that the absence of a policy may be actionable where the absence was intended by the municipality to avoid liability, *see Cornfield v. Consol. High Sch. Dist.*, 991 F.2d 1316, 1326 (7th Cir. 1993), there's no evidence of such intent here.

[15] TEX. EDUC. CODE § 11.202(c).

the bifurcated system was calculated to insulate routine personnel decisions from direct meddling by elected board members, channeling board influence in such matters into the board's decision to hire or fire a superintendent and into its power to set standards for positions. The legislature accomplished this balance of its objectives by insisting that the board hire only persons recommended by a superintendent, whom it hires and fires. So fashioned, the legislation did not erode the policymaking authority of the board; it reinforced it, albeit with procedural traces for its exercise.

The statutory structure avoids the awkward scene of a superintendent advancing an unconstitutional personnel policy that the board has explicitly disavowed, leaving the board to protest liability for a policy that it has denounced. We need not search for evidence of such a risk of dueling, binding policies. There is a strong suggestion here that, to the extent there was a Board policy, it opposed patronage.[16] That escape from such a scene is offered by the power of the board to fire the superintendent highlights that it is the board, not the superintendent, which has policymaking authority.

---

[16] The Board had informally discussed and rejected a patronage policy during a public budget meeting. Moreover, the Board had a general anti-discrimination policy which mirrored broad constitutional requirements (e.g., no discrimination based on race, religion, or national origin), although it didn't explicitly mention the right at issue here.

This statutory structure is cemented by caselaw. As *Jett* emphasized, an official whose discretionary decisions on a particular matter are final and unreviewable,[17] meaning they can't be overturned, is constrained if another entity has ultimate power to guide that discretion, at least prescriptively, whether or not that power is exercised.[18] In *Auriemma v. Rice,*[19] cited by *Jett,* the Seventh Circuit concluded that the Chicago Police Chief, who by city ordinance had unreviewable discretion to make personnel decisions, would not have set city policy in allegedly discriminating by race. Rather, the Chief would have *violated* city policy, embodied in another city council ordinance generally forbidding racial discrimination in hiring.

We AFFIRM the district court's grant of summary judgment to GISD on Barrow's § 1983 claim.

---

[17] This court in *Beattie v. Madison County School District,* 254 F.3d 595, 603 (5th Cir. 2001), characterized *Jett* as holding that "a superintendent's transfer of a teacher to another position might be a final policy decision if that action was unreviewable, even if the superintendent did not have complete control over the hiring and firing of district personnel." "Might be" does not mean "is," and a person is not a policymaker when he makes a decision simply because that decision is unreviewable.

[18] *See Jett,* 7 F.3d at 1247.

[19] 957 F.2d 397 (7th Cir. 1992).

III

The district court granted summary judgment to GISD on Barrow's claim that the patronage policy operated more harshly on people patronizing private school for religious belief than people opting for private schooling for other reasons. The court explained:

> To establish a prima facie case of disparate impact, Barrow must show that facially neutral employment standards operate more harshly on one group than another. This initial burden includes proof of a specific practice or set of practices resulting in a significant disparity between the groups. Statistical disparities between the relevant groups are not sufficient. A plaintiff must offer evidence "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."
>
> Barrow has not furnished evidence of any observed statistical disparities caused by GISD's [alleged practice]. At most, she has adduced evidence that this requirement was applied to her twice, and to Pope once. In response, GISD has introduced evidence that while employed by GISD, Assistant Superintendent Mike Cardwell . . . educated his children for twelve years in [the same school as Barrow's children], and during that time was promoted to Assistant Superintendent. . . . Taken as a whole, the evidence on which Barrow relies does not satisfy her initial

> burden of proving that GISD's employment practices have resulted in a significant disparity between Christian and non-Christians, or religious believers and non-believers.

The record evidence, read in the light most favorable to Barrow, supports the district court's conclusion that Smith did not recommend Barrow because her children were not attending the public schools, not because her children were attending a religious school. There is no probative evidence that Smith's decision had any impact upon any First Amendment-protected freedom.[20]

We AFFIRM the district court's grant of summary judgment to GISD on the Title VII disparate impact claim.

AFFIRMED.

---

[20] She also argues that GISD did not, in its motion for summary judgment, argue anything about lack of evidence of disparate impact. That is wrong; in any event, we can affirm the district court's independent conclusion based on the record.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-11151

D.C. Docket No. 3:00-CV-913

KAREN JO BARROW

Plaintiff-Appellant

v.

GREENVILLE INDEPENDENT SCHOOL DISTRICT; ET AL

Defendants

GREENVILLE INDEPENDENT SCHOOL DISTRICT

Defendant-Appellee

Appeals from the United States District Court for the Northern District of Texas, Dallas.

Before JOLLY, HIGGINBOTHAM, and DENNIS, Circuit Judges.

JUDGMENT

(Filed Feb. 26, 2007)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

ISSUED AS MANDATE: APR 20 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW, Plaintiff, VS. GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al., Defendants.	§ § § § § § § § §	Civil Action No. 3:00-CV-0913-D

MEMORANDUM OPINION AND ORDER

(Filed Dec. 20, 2005)

In this action by plaintiff Karen Jo Barrow ("Barrow") against defendants Greenville Independent School District ("GISD") and Dr. Herman Smith ("Dr. Smith"), the court addresses the remaining post-judgment matters that require a decision: Barrow's application for attorney's fees from Dr. Smith, the deferred portion of her motion to alter or amend the judgment, and her objections to GISD's bill of costs. For the reasons that follow, the court awards Barrow attorney's fees in the sum of $631,293.00, and $22,775.22 in expenses and taxable costs of court; it grants her motion to alter or amend the judgment to the extent of awarding her expenses and taxable costs against Dr. Smith; and it sustains in part and overrules in part her objections to GISD's bill of costs and awards costs to GISD of $14,492.65.

I

The court assumes the parties' familiarity with its prior opinions in this case. In its most recent decision, *Barrow v. Greenville Independent School District,* 2005 WL 1867292 (N.D. Tex. Aug. 5, 2005) (Fitzwater, J.) ("*Barrow VI*"), the court established a procedure for Barrow to submit, and for Dr. Smith to oppose, an application for attorney's fees under 42 U.S.C. § 1988.[1]

Barrow seeks an award of attorney's fees and expenses totaling $2,093,521.91, which consists of $1,989,360.50 in attorney's fees and $104,161.41 in expenses.[2] She requests an attorney's fees award for

---

[1] Barrow filed a preliminary attorney's fees application on April 11, 2005. In accordance with *Barrow VI,* she filed the instant fee application on August 25, 2005 (amended on September 6, 2005), supported by a brief and a seven-volume appendix. Dr. Smith filed his response and objections, a supporting brief, and an appendix on September 13, 2005. As permitted by *Barrow VI,* he adopted materials already on file consisting of the response, brief, and six-volume appendix filed June 14, 2004, and supplement to response filed June 23, 2004, which he had submitted as part of an attorney's fees alternative dispute resolution ("ADR") procedure presided over by Judge Sanders, and Judge Sanders' June 27, 2004 report. (Although the ADR procedure has been referred to as "arbitration," it is best described as a voluntary, non-binding ADR procedure in which the parties participated in an attempt to settle the case before trial.) Barrow filed a reply brief on September 28, 2005.

[2] As directed in *Barrow VI,* in her first amended attorney's fees application, Barrow has broken these sums out to show that amount as of the dates of the offers of judgment. *See* P. Am. Applic. 1-3.

work performed by four attorneys: Wm. Charles Bundren, Esquire ("Bundren"); Kelly J. Shackelford, Esquire ("Shackelford"); Hiram S. Sasser III, Esquire ("Sasser"); and Jonathan M. Saenz, Esquire ("Saenz"). Bundren is Barrow's lead counsel in the case. Bundren practices law with Wm. Charles Bundren & Associates, P.C. ("WCBA"). Shackelford is the founder and Chief Counsel of Liberty Legal Institute ("Liberty"), a civil liberties education and legal defense organization specializing in religious freedom cases. Sasser is Liberty's Director of Litigation, and Saenz is a Liberty Staff Attorney. Dr. Smith opposes Barrow's fee application on several grounds, asserting that the court should reject the request in its entirety or, alternatively, should award a substantially reduced amount.

Barrow requests compensation for Bundren's services based on 3,703.85 hours at the hourly rate of $450, totaling $1,666,732.50. For Shackelford's work, Barrow requests compensation based on WCBA's time records for 320.1 hours at $400 per hour and based on Shackelford's separate time records for 248.2 hours at the same hourly rate, for 568.3 hours totaling $227,320. Barrow seeks fees for 220.6 hours at $205.00 per hour for Sasser's services, totaling $45,223.00. Finally, she requests compensation for 286.2 hours at $175.00 per hour for Saenz's services, totaling $50,085.00.

To support the fee application, Barrow has submitted four sets of billing records. First, she has proffered WCBA's records, which include all of Bundren's time entries. They also include Shackelford's

time entries prior to June 23, 2004, although Shackelford was associated with Liberty, not with WCBA, throughout the history of the case.[3] Second, Barrow has submitted Shackelford's separate time sheets for his work on and after June 23, 2004. Third and fourth, she has submitted separate time records for Sasser and Saenz, respectively.

Also pending before the court is the deferred portion of Barrow's April 11, 2005 post-trial motion to alter or amend the judgment. In a memorandum opinion and order filed in conjunction with entering the judgment in this case, the court explained that, with respect to Barrow's action against Dr. Smith, the judgment provided that Barrow would bear her own taxable costs of court, subject to the court's amending the judgment in response to a timely filed post-judgment motion. *See Barrow v. Greenville Indep. Sch. Dist.*, No. 3:00-CV-0913, slip op. at 1-2 (N.D. Tex. Mar. 25, 2005) (Fitzwater, J.). Barrow challenged this part of the judgment in her motion to alter or amend judgment. In *Barrow VI* the court denied the motion except to the extent it deferred a final decision due to the outstanding issue of Barrow's recovery of attorney's fees and costs. *See Barrow VI*, 2005 WL 1867292, at *32. The court addresses today whether the judgment should be altered or amended to assess

---

[3] According to Shackelford, until mid-2004, his time records were forwarded to Bundren to be input into his firm's computerized timekeeping system.

Barrow's expenses and taxable costs of court against Dr. Smith.

The judgment awarded GISD its taxable costs of court against Barrow, and the clerk of court taxed GISD's costs in the sum of $19,741.13. On April 13, 2005 Barrow filed objections to GISD's bill of costs. In *Barrow VI* the court deferred its decision on her objections. *Id.* The court also resolves Barrow's objections in this opinion.

II

The court turns first to Barrow's first amended attorney's fees application. Barrow is entitled under the judgment to recover from Dr. Smith actual and punitive damages and prejudgment interest totaling $38,422.44 on her parental rights claim under 42 U.S.C. § 1983.[4] In a § 1983 case, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs[.]" 42 U.S.C. § 1988(b). Although § 1988

---

[4] This calculation is based on $15,455.00 in actual damages, prejudgment interest (which Barrow calculates to be $2,967.44), and $20,000 in punitive damages. Adding these sums together, Barrow obtained a judgment in the amount of $38,422.44. *See Barrow VI*, 2005 WL 1867292, at *22 ("Barrow points out that the court awarded her judgment for $15,455.00 plus prejudgment interest, which she calculates to be $2,967.44. The judgment also awarded her $20,000 in punitive damages. Adding these sums together, Barrow obtained a judgment in the amount of $38,422.44.").

uses the word "may," the court's discretion to deny attorney's fees to a prevailing party is extremely narrow. *See Scham v. Dist. Courts Trying Criminal Cases,* 148 F.3d 554, 557 (5th Cir. 1998). "Absent special circumstances that would render such an award unjust, a prevailing plaintiff should be awarded § 1988 fees 'as a matter of course.'" *Id.* (quoting *Espino v. Besteiro,* 708 F.2d 1002, 1005 (5th Cir. 1983)).

To calculate the amount of a reasonable attorney's fee, the court begins by "determin[ing] the compensable hours from the attorneys' time records, including only hours reasonably spent." *Shipes v. Trinity Indus.,* 987 F.2d 311, 319 (5th Cir. 1993). The court may reduce the number of compensable hours "[w]here the documentation of hours is inadequate." *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). The court also excludes any hours that it determines "are excessive, redundant, or otherwise unnecessary." *Id.* at 434. The court next "must select an appropriate hourly rate based on prevailing community standards for attorneys of similar experience in similar cases." *Shipes,* 987 F.2d at 319. "The number of compensable hours is then multiplied by the selected hourly rate to produce the 'lodestar' amount." *Id.*; *see also Rutherford v. Harris County, Tex.,* 197 F.3d 173, 192 (5th Cir. 1999) (citing *League of United Latin Am. Citizens #4552 v. Roscoe Indep. Sch. Dist.,* 119 F.3d 1228, 1232 (5th Cir. 1997) ("*LULAC*")). The fee applicant bears the burden to substantiate both the requested hours and the hourly rate. *Hensley,* 461 U.S. at 437. After

calculating the lodestar amount, the court must then determine whether the lodestar should be adjusted based on the factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Shipes*, 987 F.2d at 320.

III

Relying on the materials he submitted to Judge Sanders as part of a pretrial attorney's fees alternative dispute resolution ("ADR") procedure[5] and Judge

---

[5] As the court notes *supra* at note 1, in *Barrow VI* it permitted the parties in litigating this fee application to adopt materials already on file. Dr. Smith has adopted materials submitted to Judge Sanders as part of the ADR procedure. Therefore, to understand Dr. Smith's opposition arguments, it is necessary to consult his September 13, 2005 response and objections to plaintiff's fee application, September 13, 2005 brief in support of response and objections to plaintiff's fee application, June 14, 2004 response and objections to plaintiff's fee application (including volume 1, which contains his brief), and the supporting appendixes filed on June 14, 2004 and September 13, 2005.

For clarity, when the court refers in this memorandum opinion to "D. Br." it means Dr. Smith's September 13, 2005 brief in support of response and objections to plaintiff's fee application. When the court refers to "D. ADR Br." it means the brief included in volume 1 of Dr. Smith's June 14, 2004 ADR response and objections to plaintiff's fee application. When the court refers to "D. ADR Resp." it means the response and objections included in volume 1 of Dr. Smith's June 14, 2004 response and objections to plaintiff's fee application. When the court refers to "D. ADR Resp." by a volume and page designation, e.g., D. ADR Resp. 2:1, it means the volume and page of a volume other than volume 1 of Dr. Smith's June 14, 2004 response and objections to plaintiff's fee application. By "D. ADR

(Continued on following page)

Sanders' report, Dr. Smith contends that Barrow is not entitled to recover any attorney's fees, expenses, or costs, and he requests that the court adopt Judge Sanders' conclusion that the evidence is insufficient to sustain an award of expenses or costs. The court will not deny Barrow's fee application on this basis.

Although the court's decision today reaches conclusions that are in some respects similar to those found in Judge Sanders' report, Judge Sanders issued his findings as part of a non-binding ADR procedure.[6] The court must independently perform its obligation to decide Barrow's fee application. "Absent special circumstances that would render such an award unjust, a prevailing plaintiff should be awarded § 1988 fees 'as a matter of course.'" *Scham,* 148 F.3d at 557 (quoting *Espino,* 708 F.2d at 1005). Although the court concludes that Barrow's fee request must be substantially reduced, it also finds that there are no special circumstances that support completely denying her an award of attorney's fees.

IV

Dr. Smith maintains on several grounds that Barrow's fee request should be rejected in its entirety

---

Resp. Supp." it means Dr. Smith's June 21, 2004 supplement to his response and objections to plaintiff's fee application.

[6] The court is especially grateful to Judge Sanders for his willingness to preside over the ADR procedure and for the time he devoted to the matter.

or drastically reduced. He contends that Barrow has failed to meet her burden of proof because no reasonable client would accept her counsels' records due to the use of block billing. Dr. Smith also posits that Bundren's available time records are facially unreliable because the computerized records have been massively altered and Bundren claims to have worked an inhuman number of hours.

A

The court turns initially to Dr. Smith's objection to Barrow's counsels' use of block billing. Dr. Smith argues that block billing is not a normal business practice in this community and that it is prohibited by law, learned treatises, and responsible clients. He maintains on this basis that the court should reject Barrow's fee application in its entirety or, alternatively, reduce the number of hours by 75% to 85%.

"The term 'block billing' refers to 'the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks.'" *Robinson v. City of Edmond*, 160 F.3d 1275, 1284 n.9 (10th Cir. 1998) (quoting *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1554 n.15 (10th Cir. 1996)). All of Bundren's time entries before May 1, 2004 are block billed. On May 1, 2004 Bundren began using a different entry for each task rather than for each day, and he continued this practice through the end of the fee application

period.[7] All of Shackelford's time entries prior to February 16, 2005 – including those contained in the WCBA billing records and in his separate records – are block billed. On and after February 16, 2005 Shackelford did not uniformly block bill, although some entries continue to group several tasks together. Sasser's and Saenz's time entries do not appear to be block billed.

Courts disfavor the practice of block billing because it impairs the required reasonableness evaluation. When time records are block billed, the court cannot accurately determine the number of hours spent on any particular task, and the court is thus hindered in determining whether the hours billed are reasonable. *See Trulock v. Hotel Victorville,* 92 Fed. Appx. 433, 434 (9th Cir. 2004) (unpublished mem.) ("[B]lock billing creates some impediments to the analysis of attorney fee bills. . . ."); *Gratz v. Bollinger,* 353 F.Supp.2d 929, 939 (E.D. Mich. 2005) ("As a result of such 'block billing,' the Court is not able to determine the number of hours expended on each discrete task. Thus the Court cannot determine whether the number of hours billed are reasonable."); *Aiello v. Town of Brookhaven,* 2005 WL 1397202, at *3 (E.D.N.Y. June 13, 2005) ("[B]lock billing would impede the Court's ability to ascertain the nature of the work performed."); *Hells Canyon Pres. Council v.*

---

[7] In her reply brief, Barrow asserts that Bundren ceased this practice after May 1, 2004 "because of Smith's complaining." P. Reply Br. 6 n.15.

U.S. Forest Serv., 2005 U.S. Dist. LEXIS 15311, at *10 (D. Ore. Mar. 7, 2005) (Block billing "prohibit[s] a thorough reasonableness determination."); *Sea Spray Holdings, Ltd. v. Pali Fin. Group, Inc.*, 277 F.Supp.2d 323, 326 (S.D.N.Y. 2003) ("[T]he substantial amount of block billing in the fee requests renders it difficult to determine whether, and/or the extent to which, the work done by Buyers's attorneys is duplicative or unnecessary."). The Tenth Circuit, for example, strongly discourages the practice of block billing.

> The use of billing practices that camouflage the work a lawyer does naturally and quite correctly raise suspicions about whether all the work claimed was actually accomplished or whether it was necessary. This concern is particularly important in a situation where a party is seeking to have his opponent pay for his own lawyer's work.

Robinson, 160 F.3d at 1284.

An example from Bundren's time records demonstrates the difficulty his block-billing practice creates for the court. On September 5, 2001 Bundren billed 8.0 hours. Rather than separate his work into more discrete entries or categories, he combined all his tasks into the following single entry (the description is so long that it spills over into a second entry):

> Receipt and review of correspondence from Tom Brandt, Esq. regarding defendant's "latest version" of proposed Joint Status Report on settlement negotiations and length of trial; review Joint Status Report "latest version"

proposed by Dr. Herman Smith; preparation of correspondence with Kelly Shackelford; telephone conversation with Kelly Shackelford regarding Defendant's proposed Joint Status Report concerning settlement progress and settlement negotiations; review local rules and Federal Rules of Civil Procedure regarding information and "argument" of counsel included within a Joint Status Report to the Court; telephone conference with Court's secretary regarding proper content of Joint Status Report on settlement negotiations; preparation of correspondence to Tom Brandt, Esq. and Cobby Caputo, Esq. regarding Plaintiff's Objections to Defendant's case and improper conduct of Defendants reported in the proposed Joint Status Report; research Northern District's civil expense and delay reduction plan and confidentiality of ADR proceedings under Section III., F. of Northern District Plan; legal research regarding Texas statutes on alternative dispute resolution mediation session; review mediation files concerning contract and agreements signed by parties to keep communications at ADR proceedings confidential; continued legal research concerning motivating factors of Dr. Herman Smith in making decision to not promote or recommend Karen Jo Barrow for an administrator's position and mixed motive cases under Title VII and under employment discrimination under Section 1983; (continued next item)

(cont from prev. slip) continued legal research concerning Dr. Herman Smith's assertion of a

> "Mt. Healthy" defense based upon motivating factors which Dr. Herman Smith did not know in July of 1998; continued review of deposition transcripts, deposition exhibits and evidence to determine viability of Dr. Herman Smith's "Mt. Healthy" defense based upon other motivating factors which caused him to discriminate against Karen Jo Barrow; review Defendants' proposed language in Joint Status Report to the Court; preparation of draft of Plaintiff's proposed insert (alternative) to Defendants' proposed language in Joint Status Report.

P. App. 545. Because of the block billing, the court cannot accurately determine how much of the 8.0 hours Bundren devoted to any particular task, or even to a category of tasks, within the day.

Although the example the court cites is particularly problematic, there are several others like it. The records reflect that Bundren typically compiled together into one day's entry such discrete tasks as reviewing notes, preparing for discovery, writing correspondence, drafting pleadings, and conducting legal research.

Another example sheds additional light on the challenge that block billing creates for the court. Throughout April 2001 Bundren has seven billable entries that include communications with Shackelford.[8]

---

[8] These entries are found on April 3, 5, 11, 26, 27, 23, and 30, 2001.

Because all the entries are block billed, the court can only conclude that, during a one month period, Bundren spent somewhere between 0.7 hours and 47.7 hours communicating with Shackelford. This wide range is found in only a single month; the problem is compounded when the entries are extrapolated over the entire 1998-2004 block-billing period. Given the vastness of the range, the court cannot determine, *inter alia,* the reasonableness of the time Bundren billed for communicating with Shackelford.

Shackelford also engaged in block billing, but his time records are generally more illuminating. While Bundren's individual time entries often contain five or more tasks, Shackelford usually performed only a single task during a particular day; on the days he bills for more than one, only two or three tasks are usually grouped together.

Most courts that have addressed the problem of block billing have concluded that denying all block-billed attorney's fees is not an appropriate remedy. *See, e.g., Trulock,* 92 Fed. Appx. at 434 (holding that block billing "is not a basis for refusing to award attorneys' fees"); *Cadena v. Pacesetter Corp.,* 224 F.3d 1203, 1215 (10th Cir. 2000) (concluding that block billing "is not *per se* forbidden"); *Rodriguez v. McLoughlin,* 84 F.Supp.2d 417, 425 (S.D.N.Y. 1999) ("[T]he practice of block billing is not prohibited in [the Second] Circuit."). Rather, most courts reviewing block-billed time entries have performed a percentage reduction either in the number of hours or in the lodestar figure. *See, e.g., Paris v. Dallas Airmotive,*

Inc., 2004 WL 2100227, at *9-*11 (N.D. Tex. Sept. 21, 2004) (Lindsay, J.) (applying percentage reduction because of block billing); *Robinson*, 160 F.3d at 1284-85 ("[A] district court does not abuse its discretion in reducing a plaintiff's fee request when the request is based on time records that are rather sloppy and imprecise.") (internal quotation omitted); *Aiello*, 2005 WL 1397202, at *3 ("[C]ourts apply percentage cuts where there is a substantial amount of block billing in a fee request.") (internal quotation omitted). The reduction usually ranges between 10% to 30%. *See, e.g., In re Pierce*, 190 F.3d 586, 594 (D.C. Cir. 1999) (applying 10% reduction); *Gratz*, 353 F.Supp.2d at 939 (same); *Aiello*, 2005 WL 1397202, at *3 (same); *Welch v. Metro. Life Ins. Co.*, 2004 U.S. Dist. LEXIS 28576, at *10 (C.D. Cal. Sept. 20, 2004) (block billing "can result in overbilling of between 10 and 30 percent."); *Okla. Natural Gas Co. v. Apache Corp.*, 355 F.Supp.2d 1246, 1265 (N.D. Okla. 2004) (adopting magistrate judge's 15% reduction in case applying Oklahoma fee-shifting statute); *Sea Spray*, 277 F.Supp.2d at 326 (applying 15% reduction); *Gonzalez v. Bratton*, 147 F.Supp.2d 180, 213 (S.D.N.Y. 2001) (applying 12% reduction).

Based on Bundren's extensive block billing in this case, which occurred over a substantial time period, the court will reduce Barrow's request for Bundren's time by 20% for services rendered between August 27, 1998 and May 1, 2004. Because Shackelford engaged in some block billing, the court will reduce Barrow's request for Shackelford's time by 10% for

services rendered between September 22, 1998 and February 15, 2005. From the time records submitted, the court has determined that Bundren billed 2,177.15 of his claimed hours between August 27, 1998 and May 1, 2004.[9] The court reduces that number to 1,741.72 hours based on the 20% block billing adjustment. The remaining 1,526.7 claimed hours have not been reduced on this basis. The court has determined that Shackelford block-billed 340 of his claimed hours from September 22, 1998 through February 15, 2005.[10] The court reduces that number to 306 hours based on the 10% block billing adjustment. The remaining 228.3 claimed hours (i.e., 568.3-340) have not been reduced on this basis.

The court disagrees with Dr. Smith's reliance on *Walker v. U.S. Department of Housing & Urban Development,* 99 F.3d 761 (5th Cir. 1996), to contend that the court should deny Barrow's application in its entirety based on her counsels' practice of block billing. In *Walker* the Fifth Circuit held that a para-legal's billing records were "woefully inadequate to

---

[9] The court reached this finding by deducting from the 2,667.05 hours he claimed for the period August 27, 1998 through September 7, 2004 a total of 489.9 hours for the period between May 1, 2004 and September 7, 2004, leaving a net sum of 2,177.15 hours.

[10] The court reached this finding by adding to the total number of hours he claimed between September 22, 1998 and June 22, 2004 in the time records of WCBA (320.1 hours) the sum of 19.9 hours reflected in his own time records for the period June 23, 2004 through February 16, 2005.

support any fee application" because, *inter alia,* all the time was block billed. *Walker,* 99 F.3d at 773 (The billing records "never separate out her day, always lumping all of the day's activities together."). *Walker,* however, is distinguishable from this case. The *Walker* panel based the denial of the paralegal's fees both on block billing and on the fact that the records were too vague. *See id.* ("The original records contain terse listings: 'library research,' 'analyzing documents,' 'reading background documents,' 'phone interviews,' with no further explanation."). As the court explains later, although some of Bundren's and Shackelford's entries are vague, the records do not suffer from the same pervasive vagueness problem found in the *Walker* paralegal's records.[11] Thus *Walker* does not support completely denying Barrow's fee request to

---

[11] Although a large number of Bundren's block-billed entries contain vaguely described tasks, they are often a small portion of the entire time entry. For example, the following is Bundren's July 26, 2000 entry, for which he billed 5.6 hours (the vague portions are italicized):

> Preparation of revisions to Response to Request for Production; *preparation of correspondence;* preparation of Request for Production to Greenville Independent School District; *preparation of correspondence with Cobby Caputo, Esq.;* preparation of revisions to Plaintiff['s] Request for Production to Dr. Smith; *telephone conference with client*; preparation of revisions to interrogatories to Herman Smith.

P. App. 485 (emphasis added).

the extent the application is based on block-billed time.[12]

B

Dr. Smith maintains that Barrow's application should be rejected in its entirety or drastically reduced because Bundren's billing records are for two reasons facially unreliable.[13] First, he posits that Bundren's original, contemporaneous handwritten time records have been destroyed and his computerized records are unreliable because they have been

---

[12] For example, in *Hollowell v. Orleans Regional Hospital LLC,* 217 F.3d 379 (5th Cir. 2000), the Fifth Circuit affirmed an award of attorney's fees even though the billing records "lumped together" the time entries. *Id.* at 392-93. The district court had "found the . . . billing records specific enough to determine that the hours claimed were reasonable for the work performed." *Id.* at 393. The Fifth Circuit noted that "even a failure to provide contemporaneous billing statements 'does not preclude an award of fees per se, as long as the evidence produced is adequate to determine reasonable hours.'" *Id.* at 392 n.18 (quoting *La. Power & Light Co. v. Kellstrom,* 50 F.3d 319, 325 (5th Cir. 1995) (per curiam)).

[13] In his September 13, 2005 brief, Dr. Smith adopts pages 11-13 of his ADR response in support of this argument. *See* D. Br. 7 n.6. At these pages of his ADR response, Dr. Smith relies on nine examples that he posits are indicia of either gross incompetence or fraud that lead to the conclusion that no responsible client would accept the fee application as supporting a bill. These objections are either included at other portions of Dr. Smith's opposition briefing and addressed by the court in those contexts or are so conclusory that they do not merit a specific ruling. Accordingly, the court will not address them here.

massively and inexplicably altered after the fact during billing judgment review.[14] Second, he asserts that when Bundren's time records are analyzed together with his fee records in other cases, they indicate that he worked inhuman hours. Dr. Smith relies on an analysis of time records that Bundren submitted in support of Barrow's present fee application, those produced at earlier points in this litigation, and the records that Bundren submitted in support of fee applications in two other lawsuits: *Chiu v. Plano Independent School District,* No. 4:99-CV-1966 (E.D. Tex.), and *Williams v. Kaufman County,* No. 3:97-CV-0875-L (N.D. Tex.) (Lindsay, J.).

Dr. Smith argues that a comparison of the time records that Bundren submitted in support of Barrow's instant and ADR procedure fee applications with time records that she provided during the fall of 2003 indicates that Bundren made massive alterations during his billing judgment review. Dr. Smith supposes that, because under Fifth Circuit precedent billing judgment reductions should be visible to the court, Bundren will contend that these are data entry

---

[14] In his June 14, 2004 ADR response, Dr. Smith objects to the computerized records on the basis that they "are not the best evidence of the time spent on the case." D. ADR Resp. 6. Although he did not renew this objection in his current response and objections and brief, to the extent he intends to raise an objection under Fed. R. Evid. 1002, the court overrules it. Such an objection would have merit only if Barrow were relying on the computerized records to prove the content of the handwritten records.

errors. He posits, however, that such extensive errors – which account for almost 1,000 hours claimed in Bundren's original records – appear to call into question the validity of the records as a whole. He points to several specific changes as particularly troubling and argues that these entries support denying the fee application in its entirety. Included are instances where Bundren removed items from the description of work performed but did not change the amount of time claimed. In his ADR brief, Dr. Smith also cites several instances where, between the time Bundren presented billing records and the time of his ADR fee application, he changed the time allocated or tasks performed. Dr. Smith contends these are not examples of billing judgment but of errors in the records, and he urges that the vast number of alterations renders the records fundamentally unreliable.

Dr. Smith also contends that the time records Bundren presented in *Chiu* and *Williams* undermine the reliability of the records adduced in this case because together they reflect that he regularly worked in excess of what is humanly possible. Among other examples, Dr. Smith cites the period July 5, 2001 through August 7, 2001, which reflects that Bundren took no days off and billed an average of 16.7 hours per day, with no day fewer than 12.5 hours, many days greater than 18 hours, and one day (July 24, 2001) the impossible amount of 24.1 hours.

In 2003 Bundren provided Dr. Smith a copy of his billing records up to that date. Dr. Smith has submitted a copy of the 2003 records as part of the record.

Comparing the 2003 billing records with Barrow's instant fee application, it is clear that portions of Bundren's billing records have been significantly altered in the intervening two years. Barrow asserts that Bundren's alterations were performed as an exercise of billing judgment. Bundren also avers that he "found very few data entry errors in the time records." P. App. 39. To conclude that an attorney has exercised billing judgment, the court would expect to find records with some time entries marked as billable and others designated non-billable. *See Alberti v. Klevenhagen,* 896 F.2d 927, 930 (5th Cir. 1990) ("Ideally, billing judgment is reflected in the fee application, showing not only hours claimed, but also hours written off."). The sum of the billable and non-billable hours would reflect the total number of hours the attorney worked on the case. The court would be able to evaluate the attorney's exercise of billing judgment by examining the hours billed and, *inter alia,* comparing them to the hours not billed.

In several instances, this is what Bundren has done. For example, Bundren's June 12, 2000 entry shows that he worked 4.8 hours on this case. He has marked 1.5 hours as "DNB [Do Not Bill] Time," P. App. 477, reflecting that he concluded that only 3.3 hours could reasonably be billed for that day's tasks. In others, however, rather than mark some or all hours as non-billable, Bundren has simply changed the raw number of hours that he claimed he worked. For example, Bundren's June 2, 2000 entry has been altered from 7.2 hours in the 2003 records to 5.0

hours in the fee application. For at least two days' time records – July 11 and 12, 2001 – all entries for Bundren, Shackelford, and a legal assistant have been completely deleted. Alterations such as these, which are found throughout the fee application, undermine the assertion that Bundren engaged in billing judgment review.

Having considered Dr. Smith's objections and the relevant records, the court holds that Barrow should be denied attorney's fees based on the unreliability of Bundren's time records. If Bundren actually worked all the hours reflected in the 2003 billing records and has simply reduced the hours in an exercise of billing judgment – either by marking them as non-billable or by changing the raw number of hours worked – then during 2001 he worked an inhuman number of hours. When the court adds together the hours Bundren claims he devoted to this case from July 5, 2001 to August 7, 2001 with the hours he billed in *Chiu* and *Williams,* the records indicate that he worked continuously, without taking any days off, and that on no day did he bill fewer than 12.5 hours. During the same period, the records indicate that he billed, on average, 16.7 hours each day, including four consecutive days of in excess of 18 hours. The records also indicate that on July 24, 2001 he worked the impossible amount of 24.1 hours.[15]

---

[15] There are other time entries that cause the court concern. For example, Bundren's entry on November 2, 2000 contains one

(Continued on following page)

Barrow also asserts that Bundren made the alterations to correct data entry errors. Bundren avers that law clerk time was inadvertently entered together with his own time from June to September 2001 and that the alterations to the raw hours and descriptions were made to correct these data entry errors. If so, this perhaps explains why Bundren's records originally reflected his working an "inhuman" number of hours from July 5, 2001 to August 7, 2001. But this explanation also raises questions that it does not adequately answer.

First, given the number of substantial data-entry errors, the court questions why Bundren asserts in his fee application that he "found very few data entry errors in the time records." P. App. 39. Second, it is not apparent how Bundren could have accurately corrected the errors without comparing the time entries to the contemporaneously handwritten time sheets, which are apparently no longer available.[16]

---

task: "Review voice mail from opposing counsel." P. App. 495. Bundren billed 0.4 hours for this task. At 24 minutes, this was either a very lengthy voice mail, it took Bundren a great deal of time to listen to and review it, or both. Additionally, although both Bundren and Shackelford bill for numerous telephone conferences with each other, Bundren consistently bills more time than Shackelford for the same conversation.

[16] Bundren testified in his deposition as follows:

> Q: All right. As you sit here today, and in your current computer system, do you know whether or not you have the capability of giving a prebill to the court or to us that will reveal what amount of time

(Continued on following page)

Third, the court questions why Bundren would alter the raw amount of time reflected in several entries without also changing the descriptions of the tasks performed. For example, the 2003 records reflect that Bundren worked 9.0 hours on September 7, 2001. The fee application states that he worked 6.0 hours on that day, and all 6.0 hours are marked as billable. If Bundren removed the 3.0 hours because he discovered that law clerk time had been inadvertently entered with his time on that day, the court would also expect to see the law clerk's *tasks* removed from the description. Yet the description of Bundren's tasks is exactly the same in the fee application as it is in the 2003 records. These modifications are not consistent with correcting the inadvertent combination of law clerk time and tasks with Bundren's.

The court does not expect Bundren and his staff to enter all records perfectly the first time; over a

---

you actually wrote down on your handwritten daily time log for a particular day?

* * *

A. As to each and every day, no.

Q. (By Mr. Brandt) As to a particular day.

A. Well, as I said, when I started the prejudgment review process, billing judgment review process in this case, I started with the prebill worksheet, raw data that had come out of the computer.

D. ADR Resp. Supp. Ex. 2 at 297.

seven-year period[17] some data-entry errors will occur. But the scale of the errors in Bundren's records calls into question the accuracy of Barrow's entire fee application. Ultimately, the court cannot determine whether Bundren made the alterations in exercising billing judgment or did so to correct data entry errors. But regardless of the reason, Barrow's attempts to explain the alterations do not address the court's concerns about the reliability of the records, and its ability to rely on the accuracy of the records is materially compromised.

Accordingly, given the magnitude of the changes in relation to the number of hours that Barrow seeks for Bundren's services, the court will reduce Bundren's time by an additional 20% based on the unreliability of the records. *See Hensley,* 461 U.S. at 433 ("Where the documentation of hours is inadequate, the district court may reduce the award accordingly."); *Hopwood v. Texas,* 236 F.3d 256, 279 (5th Cir. 2000) (affirming 25% reduction in fee award based, *inter alia,* on inadequate documentation); *LULAC,* 119 F.3d at 1233 ("[D]istrict courts enjoy broad discretion to exclude or reduce hours based on insufficient documentation. . . .").

---

[17] Although Barrow filed this lawsuit in 2000, her counsel began providing legal services in 1998.

V

Dr. Smith additionally objects on several grounds that the hours Barrow claims in her fee application were unreasonably expended. He maintains that (1) the time Barrow requests for pursuing 15 lost motions is unreasonable; (2) the fee application contains unreasonable time for prelitigation activities; (3) the time spent on legal research is unreasonable; (4) the descriptions for many time entries are too vague or ambiguous to be compensable; (5) Barrow unreasonably seeks compensation for clerical tasks at an attorney's rate; (6) Bundren's and Shackelford's participation in two moot courts was unreasonable; (7) time Bundren spent traveling to and attending a continuing legal education ("CLE") session is not compensable; (8) time Bundren spent speaking with the media is not compensable; (9) Barrow seeks compensation for time spent pursuing claims unrelated to the claim on which she prevailed; and (10) various other entries are not compensable.

A

Dr. Smith argues that Barrow should not recover for time Bundren spent on 15 motions[14] that she lost

---

[14] The motions are: (1) Dr. Smith's May 22, 2000 partial motion to dismiss; (2) Barrow's October 3, 2000 motion for leave to take in excess of ten depositions; (3) GISD's June 22, 2001 motion to quash the deposition of Cobby Caputo, Esq.; (4) Barrow's June 29, 2001 motion for leave to take in excess of ten depositions; (5) Barrow's June 29, 2001 motion for temporary

(Continued on following page)

"unless they are either (1) so intertwined with [her] successes as to be impossible to segregate; or (2) further the progression of the case." D. ADR Br. 46. He implicitly maintains that the motions were neither intertwined with her successes nor furthered the progression of the case.

The court will not deny time spent on these motions solely on the basis that Barrow did not prevail on them. Barrow's lack of prevailing-party status would deny her an award of attorney's fees only on unsuccessful *claims,* not unsuccessful *motions. See Hensley,* 461 U.S. at 434-35 (holding that work performed on distinctly different, unsuccessful *claims* is not compensable); *Von Clark v. Butler,* 916 F.2d 255, 259 (5th Cir. 1990) (affirming reduction in hours based on district court's inability to distinguish

---

restraining order and preliminary injunction; (6) Barrow's July 12, 2001 motion to shorten time to respond to her preliminary injunction application; (7) Dr. Smith's August 1, 2001 motion to extend deadline for designating expert witnesses; (8) Dr. Smith's August 15, 2001 motion to quash and for protective order; (9) Barrow's September 4, 2001 motion to file second amended complaint; (10) Barrow's September 13, 2001 motion to compel Dr. Smith to answer interrogatories; (11) Barrow's September 14, 2001 motion to enlarge page limitations; (12) Dr. Smith's September 17, 2001 motion for leave to file two motions for summary judgment; (13) Dr. Smith's September 19, 2001 motion to show cause and for sanctions; (14) Barrow's September 27, 2001 motion for sanctions against Dr. Smith; and (15) Dr. Smith's November 5, 2001 motion to strike Barrow's expert witness.

between hours spent on successful claim and unsuccessful claim).

B

Dr. Smith makes a general and somewhat conclusory objection to the reasonableness of the time Barrow's counsel spent on this case before she filed the lawsuit in May 2000. He posits that the wasted time is particularly egregious when applied to him because he did not become a party to a claim until suit was filed and he had no opportunity to attempt to settle beforehand.

Dr. Smith directs the court to no legal authority for the proposition that the court should not award attorney's fees for time expended before filing suit. Section 1988 does not distinguish between attorney's fees incurred before and after a lawsuit is filed. Prelitigation services are often necessary and desirable, because attorneys can determine that no suit should be filed or can tailor the case to particular parties or to those claims that appear to have merit. The ultimate determination concerning the amount of fees awardable for prelitigation services is made under the methods and standards that govern fee applications generally.

Moreover, his objection is not sufficiently specific for the court to address it. A wide array of prelitigation activities would be expected in an employment discrimination-type case, including, *inter alia,* conducting informal discovery, performing legal research,

drafting pleadings, undergoing administrative procedures, and sending demand letters. The only specific reason Dr. Smith cites in his brief for why the prelitigation fees are unreasonable is that the excessive amount may have caused Barrow not to accept defendants' offers of judgment. This circumstance, even if true, does not of itself demonstrate that the fees are unreasonable. Thus the court will award reasonable attorney's fees for Barrow's counsel's prelitigation activities.

C

Dr. Smith argues that Barrow's counsel billed for an unreasonable amount of time conducting legal research. As of the date of the fee application, Bundren's civil litigation experience exceeded 25 years. Since 1993 he has specialized in representing plaintiffs in civil rights cases. Bundren's experience is relevant not only to what is his reasonable hourly rate but also to what is the reasonable number of hours for him to expend on a case. *See Rainey v. Phila. Hous. Auth.*, 832 F. Supp. 127, 130 (E.D. Pa. 1993) ("The level of skill and experience claimed by counsel not only informs the Court's judgment as to the appropriate hourly fee but also helps establish how much time counsel reasonably should have spent performing a particular task."). In his deposition, Bundren opined that in a complex case one might expect a more experienced attorney, commanding a higher rate, to conduct more research than would a novice attorney. This court cannot accept this

premise. One of the principal reasons a client is willing to pay a higher hourly rate for an experienced attorney's work is that the attorney can be expected to have sufficient expertise in the relevant field and knowledge of the applicable law to work more efficiently. "[N]ormally the higher the allowed hourly rate commanded based upon skill and experience, the shorter the time it should require an attorney to perform a particular task." *Id.* "A fee applicant cannot demand a high hourly rate – which is based on his or her experience, reputation, and a presumed familiarity with the applicable law – and then run up an inordinate amount of time researching that same law. Double dipping, in any form, cannot be condoned." *Ursic v. Bethlehem Mines,* 719 F.2d 670, 677 (3d Cir. 1983).

Bundren's and Shackelford's practices of block billing make it impossible to know exactly how many hours of legal research are included in the fee application. After extensively reviewing the time records, however, the court agrees with Dr. Smith that the compensation for legal research time that Barrow seeks is unreasonable. In an exercise of billing judgment, Bundren and Shackelford should have written off a much larger amount of legal research time because of their hourly rates. The court deems a 5% reduction in Bundren's billed hours and a 5% reduction in Shackelford's billed hours to be appropriate for unreasonable legal research. *See Hopwood,* 236 F.3d at 279 (affirming a 25% reduction in fee award based on, *inter alia,* lack of billing judgment); *Walker,* 99

F.3d at 770 ("The proper remedy when there is no evidence of billing judgment is to reduce the hours awarded by a percentage intended to substitute for the exercise of billing judgment."). Although a substantial portion of Sasser's and Saenz's billed time is also for legal research, no reduction is necessary because their hourly rates reflect that they would be expected to spend more time on legal research.

D

Dr. Smith objects to several time entries on the ground that they are vague or ambiguous and thus make it impossible to determine whether the activity is compensable and reasonable.[15]

As the fee applicant, Barrow "bears the burden of establishing entitlement to an award and documenting the appropriate hours expended." *Hensley,* 461 U.S. at 437; *see also Bode v. United States,* 919 F.2d 1044, 1047 (5th Cir. 1990) (per curiam) (holding that fee applicant's burden is met "only by presenting evidence that is adequate for the court to determine what hours should be included in the reimbursement"). "In determining the amount of an attorney fee award, courts customarily require the applicant to produce contemporaneous billing records or other sufficient documentation so that the district court can fulfill its duty to examine the application for

[15] The objections are set out in a chart contained in pages 1-94 of volume 2 of his ADR appendix. *See* D. ADR Resp. 2:1-94.

noncompensable hours." *La. Power & Light Co. v. Kellstrom,* 50 F.3d 319, 324 (5th Cir. 1995) (per curiam) (quoting *Bode,* 919 F.2d at 1047). "The district court may properly reduce or eliminate hours when the supporting documentation is too vague to permit meaningful review." *Id.* at 326. Vague entries are those that are "not illuminating as to the subject matter" or "vague as to precisely what was done." *Id.* Entries such as "revise memorandum," "review pleadings," "review documents," and "correspondence" are sufficiently vague that the court can accept or reject them in a fee application. *See id.* at 326-27, 326 n.11.

Barrow's application contains a host of vague entries, such as "review file," "preparation of correspondence," "review correspondence," "phone conference with co-counsel," "legal research," and "review email." Accordingly, the court will not award attorney's fees for the services described in these entries. *See Hensley,* 461 U.S. at 433 ("Where the documentation of hours is inadequate, the district court may reduce the award accordingly."); *Kellstrom,* 50 F.3d at 326.

Because of block billing, it is impossible to conduct meaningful review and determine the precise number of hours that should be reduced in each time entry due to vague descriptions. The court has therefore attempted to reach a fair determination by alternate means. After extensively reviewing the records, the court finds that at least 20% of Bundren's billed time and at least 10% of Shackelford's billed

time is based on descriptions that are too vague to support an award of attorney's fees.[16] The court will therefore further reduce Bundren's billable time by 20% and Shackelford's time by 10%. *See Hensley,* 461 U.S. at 433 ("Where the documentation of hours is inadequate, the district court may reduce the award accordingly."); *Hopwood,* 236 F.3d at 279 (affirming 25% reduction in fee award based, *inter alia,* on inadequate documentation); *LULAC,* 119 F.3d at 1233 ("[D]istrict courts enjoy broad discretion to exclude or reduce hours based on insufficient documentation. . . ."). Because Sasser's and Saenz's records were not block billed, a more detailed analysis is possible. After examining the individual entries to which Dr. Smith objects, the court finds that descriptions associated with 2.1 hours of Sasser's billed time and 16.8 hours of Saenz's billed time are inadequately documented and disallows these hours accordingly.

E

Dr. Smith argues that some of the time for which Bundren has billed is for clerical work that does not merit compensation at an attorney's rate. The court

---

[16] A thorough review of the records for vagueness reveals that somewhat more than 20% of Bundren's entries and more than 10% of Shackelford's entries are inadequately documented. The court is satisfied, however, that the reductions it is applying for vagueness together with the significant reductions for block billing are sufficient to encompass the vague and ambiguous entries.

agrees that three of the specific entries to which Dr. Smith objects contain clerical work.[17] Time spent on clerical work is not compensable at Bundren's rate. *See Missouri v. Jenkins,* 491 U.S. 274, 288 n.10 (1989). Bundren's practice of block billing prevents the court from determining exactly how much time he spent on the clerical tasks. Concerning the entries to which Dr. Smith objects as clerical, the court finds that approximately one hour is billed for clerical tasks and reduces the fee award accordingly.

F

After the court granted Dr. Smith's summary judgment motion on the basis of qualified immunity, Barrow successfully appealed to the Fifth Circuit. *See Barrow v. Greenville Indep. Sch. Dist.,* 332 F.3d 844 (5th Cir.) ("*Barrow*"), *cert. denied,* 540 U.S. 1005 (2003). Before the Fifth Circuit heard the appeal, Bundren participated in two separate moot court arguments: one at the University of Texas at Austin School of Law and one at the University of Houston Law Center. Bundren has billed for the time he spent preparing for, traveling to, and participating in the

---

[17] The three entries are as follows: (1) June 23, 2000 – "docket deadlines into calendar and docket control," P. App. 480; (2) June 26, 2000 – "docket scheduling order and deadlines from scheduling order," *id.* at 481; and (3) June 21, 2001 – "review and reorganize documents produced by Greenville Independent School District and exhibits to the depositions following the deposition of LaDayne Wilson and Randy Tarpley," *id.* at 525.

moot court sessions. Shackelford has also billed for the time he spent preparing for, traveling to, and attending the moot court session in Austin and organizing the moot court argument in Houston. Shackelford has also billed for the time he spent traveling to and attending oral argument before the Fifth Circuit. Dr. Smith objects to this time as unreasonable.

The court concludes that it was reasonable for Bundren to participate in one formal moot court session, but not in the other, especially given his experience at that time of approximately 23 years as a litigator and his participation in approximately 12 informal practice sessions. Accordingly, the court will reduce Bundren's time by 13.5 hours for the Austin moot court.

The court finds that, because Bundren alone argued before the Fifth Circuit and is the lead counsel in this case, Shackelford's participation in the Austin moot court session and his time incurred in attending the oral argument in the Fifth Circuit are redundant. Accordingly, the court will reduce Shackelford's time by 23.4 hours. *See Hensley,* 461 U.S. at 434 ("Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are . . . redundant. . . .").

G

Dr. Smith objects to the six hours that Bundren billed for traveling to and attending a CLE presentation on qualified immunity delivered by Dr. Smith's lead counsel on July 26, 2001. He argues that time spent on CLE is not compensable under § 1988.

In his deposition, Bundren defended billing for this time on the ground that it provided a "golden opportunity" to discern his opposing counsel's mental impressions and to glean his work product on the qualified immunity defense. D. ADR Resp. 6:69. The court agrees with Dr. Smith that Bundren's attendance at the CLE presentation, although perhaps helpful, is not compensable. *See Hensley,* 461 U.S. at 434 ("Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." (quoting *Copeland v. Marshall,* 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc))). The court will subtract the six hours from Barrow's fee award.

H

Dr. Smith objects to two of Bundren's billed entries that contain time for speaking with the media about the case. In his deposition, Bundren explained his billing for this time:

> When you're dealing with public entities, it is sometimes helpful to help a case get resolved if you have communications with the media, so that the citizens who are paying

> the tax dollars for lawyers who are representing the public entity will have an opportunity to petition their government in order to resolve and settle disputes.

D. ADR Resp. 6:69.

Barrow has adduced no evidence that demonstrates that her counsel's conversations with the media helped settle the case. Without evidence of the efficacy of the media conferences, the court will not award her fees for the time that Bundren devoted to them. *See Watkins v. Fordice,* 7 F.3d 453, 458 (5th Cir. 1993) ("[W]e find no abuse of discretion in the district court's exclusion of the press-conference hours, because Appellants did not present any evidence regarding the efficacy of the press conferences. . . ."). Although determining the exact amount of time spent on the media conferences is impossible due to Bundren's practice of block billing, the court finds that it is approximately 3.9 hours. Thus the court will reduce Bundren's time on Barrow's fee award by 3.9 hours.

I

Dr. Smith objects to entries within the fee application concerning claims he believes are unrelated to the single claim on which Barrow prevailed. Specifically, he objects to time spent pursuing a claim against him under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and litigating claims against GISD.

1

Dr. Smith objects to time Barrow's counsel billed for pursuing a Title VII claim against him. When Barrow filed this lawsuit in May 2000, she asserted a Title VII claim against Dr. Smith individually. The court dismissed the cause of action early in the case on Dr. Smith's motion to dismiss, concluding that he was not Barrow's employer and thus not a proper defendant under Title VII. *See Barrow v. Greenville Indep. Sch. Dist.,* No. 3:00-CV-0913-D, slip op. at 4 (N.D. Tex. July 14, 2000) (Fitzwater, J.). Barrow asserts that in an exercise of billing judgment, Bundren has designated all time related to Title VII as non-billable. Because several time entries with "Title VII" in the description are marked billable, Dr. Smith objects.

Although Barrow did not prevail on her Title VII claim, she is nevertheless entitled to reasonable attorney's fees for services concerning the claim if they are sufficiently related to her parental rights claim, on which she did prevail. *See Hensley,* 461 U.S. at 434-35. In *Barrow VI* the court denied Dr. Smith's request to recover attorney's fees for time his counsel expended defending the Title VII claim. *See Barrow VI,* 2005 WL 1867292, at *28. The court reasoned that all of Barrow's claims, including her Title VII action, were related to her parental rights claim because each depended on the same set of factual circumstances. *See id.* at *29. Based on the court's conclusion in *Barrow VI,* it will not deny Barrow attorney's fees for the few entries that her counsel

has not written off and that contain indications that the services in question related in some way to Barrow's Title VII claim.

2

Dr. Smith also objects to time spent pursuing claims against GISD. Because Barrow was not a prevailing party as to GISD, the court must not award time her counsel spent pursuing claims against GISD that are unrelated to her prevailing claim against Dr. Smith. Although most of the entries that contain time spent on claims that relate only to GISD have, in whole or in part, been marked "Do Not Bill," some entries remain "Billable." Although Bundren's practice of block billing precludes an exact determination of the time billed for claims against GISD, the court's best estimate is that Bundren billed for 14.8 hours that have not as yet been written off. This time will not be awarded.

J

Dr. Smith objects to time Shackelford, Sasser, and Saenz billed for various activities as redundant and duplicative. First, he objects to Sasser's attendance at the interview of witness Susan Crow on March 12, 2005 because Bundren also attended. He argues that it was wasteful for two attorneys to bill for interviewing the witness. The court agrees.

Second, he objects to the time Shackelford and Sasser billed to attend the June 25, 2004 settlement conference before a magistrate judge, contending that one attorney's presence would have been sufficient. The court agrees that Sasser's attendance was redundant and unnecessary, but the court finds that it was reasonable for Shackelford to attend the settlement conference.[18]

Third, Dr. Smith objects to billing for Sasser's attendance at the pretrial conference. Because Bundren and Shackelford were also in attendance, the court agrees that Sasser's attendance was duplicative and that his time is not reasonably compensable.

Fourth, Dr. Smith objects to time billed for Sasser's and Saenz's attendance at trial. He posits that since Shackelford attended and was not responsible for examining witnesses, he could have performed any other coordination necessary. Barrow has not met her burden of demonstrating why it was necessary for four attorneys to attend trial. Because Sasser's and Saenz's trial attendance was duplicative, the court will not award Barrow attorney's fees for their time attending trial. Accordingly, the court will

---

[18] The court finds that there is a sufficient distinction between the necessity to have two attorneys for the same party participate in a settlement conference, and to have two attend an oral argument where only one attorney will present argument, that the court's reasoning concerning denying Shackelford's moot court and Fifth Circuit argument fees does not apply here.

reduce Sasser's billable time by 114.8 hours and Saenz's billable time by 70.1 hours.

K

Dr. Smith finally objects to various other entries as being unreasonable. The court recognizes that it is possible that Barrow's fee application seeks compensation for other unreasonably expended time. Dr. Smith has failed in his objections, however, to demonstrate why the entries to which he objects are unreasonable. Additionally, the court is persuaded that the percentage deductions it has already made are sufficient to account for such unreasonable services. Thus the court will make no additional reductions on this basis.

VI

Having determined the reasonable number of hours to be included in the lodestar calculation, the court next considers the question of reasonable hourly rates.

A

The hourly rates to be used in the lodestar calculation are determined by "the prevailing market rates in the relevant community." *Blum v. Stenson,* 465 U.S. 886, 895 (1984). As the fee applicant, Barrow bears the burden of demonstrating "that the requested rates are in line with those prevailing in the

community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* at 895 n.11. Barrow requests $450 per hour for Bundren, $400 per hour for Shackelford, $205 per hour for Sasser, and $175 per hour for Saenz.

As of the date of the fee application, Bundren had been in private-practice civil litigation for over 25 years. Since 1993 he has primarily represented plaintiffs in civil rights cases. He asserts that his current customary hourly rate is $475, although in this case his hourly rate is $450. Shackelford has 17 years of experience, and his practice also focuses on civil rights, primarily religious freedom. In his affidavit, Shackelford does not indicate what is his current customary hourly rate; he instead asserts that his "reasonable rate *in this case* is $400 per hour," P. App. 62 (emphasis added), and his "hourly rate with regard to *this matter* is $400," *id.* at 66 (emphasis added). In addition to Bundren's and Shackelford's affidavits, Barrow has submitted the affidavits of four attorneys who practice in the Northern District of Texas: Donovan Campbell, Jr., Esquire ("Campbell"), David J. LaBrec, Esquire ("LaBrec"), Robert T. Mowery, Esquire ("Mowery"), and Charles A. Gall, Esquire ("Gall"). Each avers that $450 is a reasonable hourly rate for Bundren and that $400 is a reasonable hourly rate for Shackelford.

Dr. Smith contends the rates Barrow requests for Bundren and Shackelford are unreasonable; he does not challenge the rates for Sasser and Saenz. Dr. Smith maintains that (1) Bundren and Shackelford

have never received their claimed historical rates; (2) the court should discount the affidavits of Campbell, LaBrec, Mowery, and Gall because they specialize in areas outside civil rights law, such as commercial litigation; (3) LaBrec's testimony about customary rates contradicts the rates actually charged by and awarded to senior partners in his own firm; and (4) in the two cases in which Bundren was awarded unusually high rates, the defendants did not contest the amount of the claimed rates. Dr. Smith relies on the affidavit of Edward B. Cloutman, III, Esquire ("Cloutman") to rebut the affidavits on which Barrow relies.

B

Dr. Smith first challenges the hourly rates that Barrow requests for the services of Bundren and Shackelford, arguing that they have never received these hourly rates. "When the attorney's customary hourly rate is within the range of hourly fees in the prevailing market, that rate should be considered in setting a reasonable hourly rate." *LULAC,* 119 F.3d at 1234. Bundren does not indicate what is his current customary hourly rate to fee-paying clients. He asserts that his "current hourly rate for handling matters such as this matter . . . is $475." P. App. 47. But he does not state that he has ever been paid at this rate. Shackelford likewise opines concerning what is reasonable in this case, but he does not aver that he has been paid by other clients at this rate. Moreover, apart from the fees awarded in other cases

in which Bundren or Shackelford participated, Barrow has not submitted any evidence of the attorneys' customary rates.[19] Thus in setting a reasonable hourly rate, the court cannot consider the customary hourly rates that Bundren and Shackelford have charged and been paid.

Dr. Smith also argues that the court should discount the affidavits of Campbell, LaBrec, Mowery, and Gall, each of whom practices in the area of complex civil litigation. The court is aware from its experience over the years with several of these attorneys that they are highly skilled and ethical practitioners. Nevertheless, although some of them have experience in civil rights litigation, none purports to focus his law practice on this area of the law. The prevailing market rate is the rate charged "for *similar services* by lawyers of reasonably comparable skill, experience, and reputation." *Blum,* 465 U.S. at 895 n.11 (emphasis added). Unlike Cloutman, on whose testimony Dr. Smith relies, none of these attorneys routinely provides similar services to those of Bundren and Shackelford, i.e., plaintiff's civil rights and employment discrimination representation. The court thus

---

[19] Shackelford avers that, in another case in this court involving civil liberties and religious rights, he was awarded in early 2004 attorney's fees at an hourly rate of $350 for work done primarily in 2003. Although the court will consider this evidence in determining a reasonable rate for his work in this case, this is not proof of customary rates charged to and paid by fee-paying clients.

finds that their testimony is outweighed by Cloutman's.[20]

Dr. Smith also relies on Cloutman's affidavit to rebut the attorney affidavits on which Barrow relies.[21] Cloutman is a Dallas attorney with over 36 years' experience. He practices in the area of plaintiff's civil rights and labor and employment, and he has been a board-certified specialist in labor and employment law since 1975, when certification by examination first became available in Texas. He has litigated numerous claims brought under 42 U.S.C. §§ 1981, 1982, 1983, 1973, and 2000e.[22] Cloutman opines that, for plaintiff's civil rights attorneys in the Northern

---

[20] Because the court does not rely on LaBrec's deposition, it need not address Dr. Smith's contention that LaBrec's testimony contradicts the rates charged by senior partners in his firm.

The court likewise need not address in detail Dr. Smith's fourth argument, in which he contends that, in the two cases where Bundren was awarded unusually high hourly rates, the defendants did not contest the rates. In neither Barrow's reply brief nor in Bundren's affidavit does Barrow specifically rely on the fee awards in those cases to support Bundren's claimed hourly rate in this case.

[21] Cloutman's affidavit is dated June 11, 2004. Although a period of 18 months has elapsed since then, and substantial proceedings have since taken place, the court finds that his opinion concerning a reasonable hourly rate – which is stated as a range – is entitled to the weight the court gives it. In particular, when Cloutman expressed his opinion, he was aware that Barrow sought $450 per hour for Bundren's services and $400 per hour for Shackelford's.

[22] Cloutman has capably tried cases before this court and has appeared in several suits over a period of several years.

District of Texas with 20 to 30 years of experience, hourly rates range between $250 to $350 depending on the complexity of the case and the degree of recovery obtained. He states that this case "does not have the appearance of complex litigation," D. ADR Resp. 1: 6, and that "[t]he 'lodestar' rate should be set in light of the *lack* of complexity of this litigation." *id.* at 7 (italics substituted for bold font). He recommends that Bundren's rate be set somewhere in the middle of the $250 to $350 per hour range. Based on Cloutman's extensive experience and skill in the type of litigation involved in this case and his ability to opine concerning the prevailing market rate charged for similar services by lawyers of reasonably comparable skill, experience, and reputation, the court finds persuasive his opinion concerning what is the range of a reasonable hourly rate. Having considered the record in this case, including the attorney's fee submissions, and Bundren's skill, experience, and reputation, the court finds that the reasonable hourly rate for his services is $300. Shackelford has less experience than the range of 20 to 30 years on which Cloutman based his opinion. Based on the same considerations of skill, experience, and reputation, the court sets Shackelford's hourly rate at $250.[23]

---

[23] Although these findings might warrant correspondingly lower rates for Sasser and Saenz, Dr. Smith does not expressly challenge their rates, and the court will not adjust them lower in the absence of a specific objection and argument that supports such an adjustment.

VII

The court next calculates the lodestar fee and considers the *Johnson* factors.

A

For the reasons explained above, the court reduces Bundren's claimed time as follows. From the total claimed hours of 3,703.85, the court subjects 2,177.15 block-billed hours to a 20% reduction (i.e., 435.43 hours). The court thus reduces the total of 3,703.85 hours by 435.43 hours based on block billing. The court makes three additional percentage reductions from the sum of 3,703.85: 20% for unreliable records (740.77 hours), 5% for unreasonable legal research (185.19 hours), and 20% for vague descriptions (740.77 hours). The court also deducts 39.2 hours based on objections sustained to specific services. This results in a total number of approved hours of 1,562.49 for Bundren's services. The court multiplies this by the hourly rate of $300, resulting in a lodestar of $468,742.00.

Concerning Shackelford, from the total claimed time of 568.3 hours, the court subjects 340 block-billed hours to a 10% reduction (i.e., 34 hours). The court thus reduces the total of 568.3 by 34 hours based on block billing. The court makes two additional percentage reductions from the total claimed hours of 568.3 hours: 5% for unreasonable legal research (28.41 hours), and 10% for vague descriptions (56.83 hours). The court also deducts 23.4 hours

based on objections sustained to specific services. This results in a total number of 425.66 approved hours for Shackelford's services. The court multiplies this by the hourly rate of $250, resulting in a lodestar of $106,415.00.

Based on the foregoing findings and reasoning, the court reduces Sasser's time by 116.9 hours, resulting in 103.7 hours. Multiplying Sasser's hours by the hourly rate of $205.00 yields a lodestar fee of $21,258.50. The court reduces Saenz's time by 86.9 hours, resulting in 199.3 hours. Multiplying Saenz's hours by the hourly rate of $175.00 yields $34,877.50.

The sum of the attorney's fees for all of Barrow's attorneys is the lodestar fee of $631,293.00.

B

After calculating the lodestar, the court is obligated to consider whether it should be adjusted upward or downward based on the *Johnson* factors. *Rutherford,* 197 F.3d at 192.[24] The court "must be

[24] The *Johnson* factors are as follows: (1) the time and labor required for the litigation; (2) the novelty and complication of the issues; (3) the skill required to properly litigate the issues; (4) whether the attorney was precluded from other employment by the acceptance of this case; (5) the attorney's customary fee; (6) whether the fee is fixed or contingent; (7) whether the client or the circumstances imposed time limitations; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case;

(Continued on following page)

careful, however, not to double count *a Johnson* factor already considered in calculating the lodestar when it determines the necessary adjustments." *Shipes,* 987 F.2d at 320. Dr. Smith has not requested an adjustment to the lodestar based on the *Johnson* factors, nor has he discussed the applicability of the factors in this case. Nevertheless, the court has considered each of the 12 factors. The court concludes that, with the exception of the eighth, each factor is either subsumed within the lodestar calculation or is not sufficiently pertinent to the facts of the case to warrant discussion. *See Curtis v. Bill Hanna Ford, Inc.,* 822 F.2d 549, 552 (5th Cir. 1987) ("In applying [the *Johnson* factors], the district court must explain the findings and the reasons upon which the award is based. However, it is not required to address fully each of the 12 factors." (citation omitted)).

The eighth factor is "[t]he amount involved and the results obtained." *Johnson,* 488 F.2d at 717-19. "Indeed, 'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Farrar v. Hobby,* 506 U.S. 103, 114 (1992) (quoting *Hensley,* 461 U.S. at 436). "[I]f 'a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be

---

(11) the nature and length of the attorney-client relationship; and (12) awards in similar cases. *Johnson,* 488 F.2d at 717-19.

an excessive amount.'" *Id.* (quoting *Hensley,* 461 U.S. at 436).

From a non-monetary standpoint, Barrow clearly obtained excellent results. The gravamen of her suit was that Dr. Smith refused to interview or promote her unless she placed her children in public school, thereby violating her constitutionally protected right as a public-school employee to select a private-school education for her children. She sought relief under § 1983 for violations of her rights under the First and Fourteenth Amendments and on state-law causes of action arising under Chapter 110 of the Texas Civil Practice and Remedies Code and Article I, § 6 of the Texas Constitution. She also alleged a Title VII claim against Dr. Smith that was dismissed early in the case. Barrow did not prevail on each legal theory, but "claims for relief that involve a common core of facts, or derive from related legal theories, cannot be viewed as a series of discrete claims." *Hernandez v. Hill Country Tel. Coop.,* 849 F.2d 139, 144 (5th Cir. 1988). Moreover, she established by her lawsuit that her constitutional right had been violated, that she had sustained actual damages as a result, and that Dr. Smith should be punished for his conduct through an award of punitive damages. Before trial, she prevailed in the Fifth Circuit, securing a ruling that "the constitutional right of public-school employees to select a private-school education for their children was clearly established when Smith refused to consider Barrow for the position of assistant principal."

Barrow, 332 F.3d at 848. When her success is viewed without reference to the damages award, no reduction in the lodestar is warranted based on the eighth *Johnson* factor. *See Hensley*, 461 U.S. at 435 ("Where a plaintiff has obtained excellent results, ... the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. . . . The result is what matters.").

The court's analysis does not end, however, with the assessment of Barrow's success in establishing her right to recover judgment against Dr. Smith. "The amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded. . . ." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality opinion). Barrow recovered $35,455.00 in actual and punitive damages. The lodestar fee is therefore over 17 times the monetary result Barrow obtained.[26] "An attorneys' fee award does not need to be commensurate with the actual amount of dollars awarded to the plaintiff." *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 663 (5th Cir. 2002). "A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988." *City of Riverside*, 477 U.S. at 576. Thus

---

[26] Interest is not included in the results obtained for purposes of comparing the results with the fee award. *See Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1048 n.6 (5th Cir. 1998).

> [i]n the absence of other *Johnson* factors justifying a reduction in a fee award, a district court should not reduce the fee award solely because of a low damages award. Such an approach would lead to a proportionality requirement between the amount of attorney's fees and the amount of damages and was explicitly rejected by the Court in *Riverside.*

Cobb v. Miller, 818 F.2d 1227, 1235 (5th Cir. 1987); *accord Hollowell v. Orleans Reg'l Hosp. LLC,* 217 F.3d 379, 392 (5th Cir. 2000). Nevertheless, "[t]he amount of damages a plaintiff recovers is . . . one of many factors that a court must consider when calculating an award of attorneys' fees." *Green,* 284 F.3d at 663. While "[t]here is no *per se* requirement of proportionality in an award of attorney fees under 42 U.S.C. § 1988[,] . . . proportionality is an appropriate consideration in the typical case." *Hernandez,* 849 F.2d at 144 (citing *City of Riverside,* 477 U.S. 561).

The court's consideration of proportionality requires that it "give primary consideration to the amount of damages awarded as compared to the amount sought." *Migis v. Pearle Vision, Inc.,* 135 F.3d 1041, 1048 (5th Cir. 1998) (addressing Title VII claim) (quoting *Farrar,* 506 U.S. at 114). In the June 2001 report of Barrow's damages expert, J. Herbert Burkman, Ph.D. ("Dr. Burkman"), he opined that her net income losses ranged from $70,008.00 to $109,091.00, and her net pension losses ranged from $32,464.00 to $70,022.00. Nov. 5, 2004 App. to D. Mot. for Summ. Judgment 606. He concluded under

all three scenarios that her lost past income was $15,455.00. *Id.* at 701. He opined that the present value of her lost future income ranged from $54,553.00 to $93,636.00. *Id.* When added to $15,455.00, these figures account for the $70,008.00 to $109,091.00 range of damages. He opined that the present value of her lost pension income ranged from $32,464.00 to $70,022.00. *Id.* Together, her past and future damages ranged from $102,472.00 to $179,113.00.

In his November 2003 updated report, however, Dr. Burkman reduced the three scenarios to one and revised his overall opinion downward based on updated information. He increased the amount of back pay from $15,455.00 to $25,454.00. *Id.* at 693. But he opined that the present value of Barrow's future net lost income was $10,998.00. *Id.* The reduction resulted from Barrow's promotion to an administrative position in academic year 2001-02. *Id.* at 694. For similar reasons, he also reduced the present value of her future net lost pension income to $8,398.00. *Id.*

Consistent with Dr. Burkman's updated report, in closing argument Barrow asked the jury to award $25,000 for lost back pay and $19,000 for lost future pay. The jury returned a verdict of $15,455.00 for lost earnings in the past – effectively adopting Dr. Burkman's June 2001 opinion over his November 2003 opinion – and $0 for lost earnings that she would likely suffer in the future, rejecting the claim that she would suffer any lost future pay or pension benefits.

In analyzing the amount of damages awarded to the amount sought, the court concludes first that the proper comparison is between what Barrow sought at trial based on the November 2003 expert opinion and what the judgment awarded based on the verdict. Barrow should obtain the benefit of lowering her damages claim during the course of the litigation based on the fact that she had been promoted. The court should not compare the damages the judgment awards her against what she sought before a promotion effectively reduced her monetary damages. This is true in any case in which a plaintiff has a duty to mitigate damages, and it is particularly true in this case, since Dr. Smith argued by pretrial motion and at trial that Barrow had failed to mitigate her damages.

Comparing the judgment with what Barrow sought at trial based on Dr. Burkman's November 2003 opinion, the court holds that the lodestar should not be reduced. Barrow obtained approximately 35% of the actual damages she sought. Although this is comparatively small when viewed only as a percentage, it is only $28,545.00 shy of the actual damages sought.[27] Additionally, in response to her request for

---

[27] The court recognizes that, in *Migis*, the panel reversed a fee award where the plaintiff obtained only approximately 24% of the actual damages sought. *See Migis*, 135 F.3d at 1048 (plaintiff requested $50,000 in compensatory damages and was awarded $12,233.32). But unlike the instant case, in *Migis* the plaintiff had originally sought $325,000 in back pay and benefits and punitive and compensatory damages, recovered only

(Continued on following page)

an unspecified amount of punitive damages, the jury awarded $20,000, a sum that exceeds the actual damages. Together, the actual and punitive damages total approximately 80% of the actual damages requested. Considering these facts together, the court declines based on the eighth *Johnson* factor to adjust the attorney's fee award based on the proportionality of the damages award to the lodestar.

VIII

Dr. Smith argues that Barrow's fee request should be reduced because of numerous settlement offers. He reasons that even if his offers of judgment under Fed. R. Civ. P. 68 were not technically effective, they are proof that Barrow's fee application should be drastically reduced. The only case from this circuit that Dr. Smith cites in support of this proposition is *Jason D.W. v. Houston Independent School District*, 158 F.3d 205 (5th Cir. 1998) (per curiam).[28] *Jason D.W.* concerned an award of attorney's fees under 20 U.S.C. § 1415, the fee-shifting provision of the Individuals with Disabilities in Education Act. Section 1415(e)(4)(F)(i) provides for a reduction of attorney's fees when the fee applicant has unreasonably

---

$12,233.32, and the amount sought was "over twenty-six times the damages actually awarded." *Id.* Additionally, unlike this case, where Barrow prevailed against Dr. Smith on the central theory of her case, in *Migis* the plaintiff prevailed on only one act of discrimination that supported one theory of recovery. *Id.*

[28] Dr. Smith also cites three cases from the Seventh Circuit.

protracted litigation by, for example, refusing to accept a reasonable settlement offer. *Jason D.W.*, 158 F.3d at 211. Because § 1988 contains no such provision, *Jason D.W.* is inapposite. The court is not aware of any binding precedent, and Dr. Smith has not directed the court to none, that holds that the court can reduce a fee award based on a plaintiff's refusal of an offer of judgment that is not effective under Rule 68. Consequently, the court declines to do so in this case.

IX

Dr. Smith next maintains that his Rule 68 offers were effective. For the reasons that follow, the court holds they were not.

As the court explained in *Barrow VI*, in order for Rule 68 to benefit Dr. Smith, the value of the judgment Barrow obtained, plus the value of Barrow's pre-offer court costs and attorney's fees, must not exceed $100,000 before January 18, 2001, and must not exceed $154,666.00 before September 8, 2004. *See, e.g., Barrow VI*, 2005 WL 1867292, at *26 (addressing January 18, 2001 offer) ("[F]or purposes of conducting the comparison called for by Rule 68, the court must compare Dr. Smith's offer to the value of the judgment Barrow obtained ($38,422.44), plus the value of the sum of Barrow's pre-offer court costs and attorney's fees, to ensure the comparison of like 'judgments.'"). "Because Barrow pursued her constitutional claims under § 1983, as a prevailing plaintiff,

Barrow would be entitled to recover reasonable attorney's fees as part of her costs pursuant to 42 U.S.C. § 1988. Thus in the instant case, the 'costs' mentioned in Rule 68 encompass not only Barrow's taxable court costs, but also her reasonably-incurred attorney's fees." *Id.* at *18 (citation omitted). And as the court explains below in addressing Barrow's requests for out-of-pocket expenses, § 1988 fee awards also include reasonable out-of-pocket expenses that are part of the costs normally charged to a fee-paying client. *See infra* § XI(B). Accordingly, if the sum of the value of Barrow's $38,422.44 judgment, plus her reasonable pre-offer costs and attorney's fees, plus her reasonable out-of-pocket expenses that are recoverable as part of her attorney's fees, exceeds $100,000 or $154,666.00 on the relevant date, Rule 68 does not result in a denial of attorney's fees and costs.

The court first considers the $100,000 offer of judgment made on January 18, 2001. Barrow seeks the sum of $176,175.00 for the services of Bundren and Shackelford through January 16, 2001. This amount is based on 482.1 hours for Bundren, at the hourly rate of $350, and 24.8 hours for Shackelford, at the hourly rate of $300. Were the court to apply to these claimed hours the percentage cuts specified above and calculate the lodestar using the rates Barrow seeks, the attorney's fees would exceed the $61,577.56 threshold (i.e., $100,000-$38,422.44) that, combined with the $38,422.44 award of actual and punitive damages and prejudgment interest, is

necessary to exceed Dr. Smith's $100,000 Rule 68 offer.[29] Of course, the court has today approved lower hourly rates for each attorney. At these 2005 rates (there is insufficient evidence in the record to enable the court to calculate in a non-arbitrary manner any lower rates for the 1998-2001 period), and applying the percentage cuts, Barrow falls $6,287.56 short of meeting the $100,000 threshold.[30] The court finds, however, from its entry-by-entry study of the time records for the period August 27, 1998 through January 17, 2001 that, at least for the following reasons, it should not apply the percentage cuts according to a methodology that would trigger the preclusive effect of Rule 68.[31]

---

[29] The court would deduct 65% from Bundren's 482.1 hours, resulting in 168.8 hours, and multiply those hours by the rate of $350, for a total of $59,080. It would deduct 25% from Shackelford, resulting in 18.6 hours, and multiply those hours by the rate of $300, for a total of $5,580. Together, the fees would exceed the $61,577.56 threshold. (For mathematical simplicity, the court calculates all threshold sums in the amounts necessary to equal Dr. Smith's offers. The court recognizes that it must add one penny to these sums to exceed the offers.)

[30] Based on the rates approved today, Bundren's 168.8 hours would be valued at $50,640 and Shackelford's 18.6 hours would be valued at $4,650, for a total of $55,290, leaving Barrow $6,287.56 short of the $100,000 threshold.

[31] This reasoning applies regardless of the hourly rate the court uses in assessing this time period. In other words, even if the court could use the 2005-approved rates for Bundren and Shackelford as starting points, and had a basis in the record to

(Continued on following page)

First, the percentage cuts are based on a fair and reasonable analysis of almost seven years of legal services (including five years of litigation), but they are less precise when overlaid on discrete periods of time. The prelitigation and litigation activities covered by the 1998-2001 time period are not in all respects like those found throughout the entire life of this case. Particularly given the closeness of the amount necessary to put Barrow over the threshold ($6,287.56), the court cannot justify using what might be termed rough percentages to decide a question that calls for precision.

Second, Barrow's counsel have written off many hours during this period, and Barrow does not seek compensation for the non-billable services. Several of these hours include legal research. Although the court would have at least applied a 5% reduction for legal research and might have applied the other percentage reductions, it likely would not have disapproved the hours in their entirety. At Bundren's and Shackelford's court-approved hourly rates ($300 and $250), it would not require reinstatement of very many of the hours written off to make up the $6,287.56 shortfall.

Third, Barrow has not sought any compensation for a substantial number of hours incurred by legal associates and legal assistants. Under § 1988 these

---

extrapolate backward in time to use lower rates for the 1998-2001 period, the result would be the same.

types of services are recoverable at market value if the prevailing practice in the relevant community is to bill these services directly to clients. *LULAC,* 119 F.3d at 1235 (citing *Missouri,* 491 U.S. at 286-88). While the court will not award today fees that Barrow does not seek, the court can rely on her counsels' exercise of billing judgment to justify its decision not to apply the percentage cuts uniformly to the 1998-2001 period to trigger the effect of Rule 68.

After considering these factors and conducting an extensive review of the pre-January 18, 2001 records, the court finds that, as of January 18, 2001, Barrow's court costs and attorney's fees exceeded $61,577.56. Consequently, the value of the judgment Barrow obtained, plus the value of Barrow's pre-offer court costs and attorney's fees, exceeded $100,000. Dr. Smith's Rule 68 offer of judgment does not entitle him to relief.

The court next considers the September 8, 2004 offer of $154,666.00. This offer can be addressed in short order. The court finds that, as of September 7, 2004, a date that followed extensive, additional pretrial motion practice and proceedings, including a successful appeal to the Fifth Circuit, Barrow had incurred far more than the sum of $116,243.56 in attorney's fees that was necessary to overcome the offer of judgment.

Accordingly, the court holds that Dr. Smith's offers of judgment do not preclude Barrow from recovering her attorney's fees and costs.[32]

X

Finally, Dr. Smith argues that Barrow's fee application should be rejected in its entirety because Bundren's records show evidence of fraud or gross incompetence. He relies on the alterations that Bundren made to his time records, the inhuman number of hours Bundren claims to have worked in this case, *Chiu,* and *Williams,* and his contemporaneous work on at least 14 other cases (including appeals to the Fifth Circuit and the Texas Supreme Court). Dr. Smith requests that, if the court concludes that he has provided insufficient evidence to justify complete rejection of the fee application, he be allowed to conduct discovery to compare Bundren's time records in other cases with those he submitted in this case, *Chiu,* and *Williams.*

The court declines on the grounds asserted to reject Barrow's fee application in its entirety, and it also denies Dr. Smith's request for discovery. The court's analysis of the question whether Bundren was grossly incompetent in how he maintained his time records in this case, or even in *Chiu* or *Williams,* is

---

[32] The court addressed Dr. Smith's August 23, 2000 $30,000 offer of judgment in *Barrow VI. See Barrow VI,* 2005 WL 1867292, at *24.

subsumed in its decisions concerning whether Barrow's fee application should be reduced based on factors the court has already addressed. In other words, if Bundren was grossly incompetent in how he recorded his time, such conduct has resulted in the fee reductions that the court has already made based on recognized standards. Whether the reductions result from gross incompetence or mere negligence or ineptitude is not determinative. His timekeeping practices have resulted in his loss of fees that he might otherwise have been able to support had he kept time properly.

The allegations that Bundren's records contain "indicia of fraud," D. Resp. 10, or "evidence of fraud," D. Br. 24, are very serious charges. Based on its careful study of the record developed in this case, including Bundren's billing records, the court is not prepared to find that Bundren engaged in fraudulent billing practices. Such a conclusion would require a finding of scienter that the court will not make on a paper record and for which there are insufficient grounds to warrant an evidentiary hearing.[33] At a

---

[33] In *Williams* Judge Lindsay assessed similar evidence from this case, *Chiu, and Williams* in the context of deciding a motion for new trial on the issue of attorney's fees and request for leave to take related discovery. *See Williams,* No. 3:97-CV-0875-L (N.D. Tex. Mar. 15, 2004) (Lindsay, J.). He observed concerning five instances of questionable entries (grossly excessive hours billed on five days) that they raised both the possibility of fraud and the possibility that the entries resulted from "lack of attention to detail, simple mistake, or some other

(Continued on following page)

minimum, however, what has come to light concerning Bundren's billing practices from the analysis of his time records in this case, *Chiu,* and *Williams* warrants his making immediate and substantial changes in those practices, if he has not done so already.

XI

Barrow seeks reimbursement for the following categories of costs and expenses, totaling $104,161.41: mediation fee, deposition transcripts, office and vendor duplication (photocopies), telecopies (facsimiles), filing fees/court costs, attorney travel, delivery/courier services, expert witnesses, telephone charges, and other (courtroom equipment). Barrow bears the burden of supporting her request for costs and expenses with evidence documenting the costs incurred. *Wright v. Blythe-Nelson,* 2004 WL 2870082, at *9 (N.D. Tex. Dec. 13, 2004) (Fitzwater, J.) (citing *Waggoner v. Trans Union, LLC,* 2003 WL 22838718, at *2 (N.D. Tex. Nov. 24, 2003) (Fish, C.J.)). Dr. Smith objects to Barrow's claimed expenses, contending the request should be denied or reduced because the

---

unintentional conduct." Slip op. at 5. He noted that these instances represented but a small number of thousands of time entries spanning a period of seven to eight years. *Id.* at 5-6. Although he held that challenges to time entries in the present case should be raised in this litigation, *id.* at 6-7, he also concluded that the occurrence of errors in *Chiu* or this case "simply does not suggest that fraud was perpetrated on the court regarding attorney's fees in *[Williams],*" *id.* at 7.

claimed expenses are not sufficiently supported, are unavailable or limited by statute, or are not recoverable because they are unreasonable, are unrelated to her claims against Dr. Smith, or relate to matters that she lost. He also maintains that she is estopped from requesting or receiving costs and expenses to the extent she fails to meet the specificity standards on which she relies to object to GISD's bill of costs.

A

The court first considers whether the expenses Barrow seeks are recoverable under 28 U.S.C. § 1920.[34] Under § 1920 Barrow's expenses for deposition transcripts are available if the materials were necessarily

---

[34] 28 U.S.C. § 1920:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

obtained for use in the case. *Wright,* 2004 WL 2870082, at *10. Photocopy expenses are compensable if the copies were necessarily obtained for use in the litigation. *Id.* Court costs that are specified in § 1920 are taxable. *See* 28 U.S.C. § 1920; *Crawford Fitting Co. v. J. T. Gibbons, Inc.,* 482 U.S. 437, 439-40 (1987) (holding that costs specified in § 1920 are taxable), *superseded in part by statute,* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074. Telecopy (facsimile) charges, attorney travel expenses, delivery/courier services fees, and telephone charges, are not recoverable under § 1920. *Wright,* 2004 WL 2870082, at *10. Neither are mediation fees, *see Mota v. University of Texas Houston Health Science Centyer,* 261 F.3d 512, 530 (5th Cir. 2001), nor expert witness fees or courtroom equipment costs, which are not enumerated in § 1920, *see, e.g., Gaddis v. United States,* 381 F.3d 444, 451-52 (5th Cir. 2004) (en banc) (holding that, under *Crawford Fitting,* only expenses listed in § 1920 are recoverable).

1

Barrow requests deposition expenses in the amount of $20,128.22. Costs related to taking depositions and obtaining stenographic copies of depositions are allowed if the materials were necessarily obtained for use in the case. *Wright,* 2004 WL 2870082, at *10 (citing *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 536 (5th Cir. 1999); *Waggoner,* 2003 WL 22838718, at *2). As evidence of her deposition expenses, Barrow first submits a letter from Janis

Rogers & Associates ("JRA") listing the invoices WCBA has paid in this case, which total $16,133.47. Barrow also submits a letter from Jill Johnson Court Reporting that reflects deposition fees in the amount of $2,901.75. Finally, in her fee application, Barrow requests reimbursement for $1,193.00 with the description "Rogers, Harris (dep. Gib Weaver Lubbock, Texas 6/2001)," P. Am. Applic. 2, but she submits no letter or invoice to support this expense.

Dr. Smith objects specifically to 17 entries (for subpoenas, depositions, and nonappearance fee) reflected on the JRA letter, totaling $5,573.98. First, he objects to fees for the depositions and subpoenas for GISD School Board members, arguing that their testimony was relevant only to issues related to Barrow's claims against GISD. Second, he objects to the depositions by written questions that Barrow attempted to conduct but that the court concluded were unwarranted. Third, he objects to the deposition-related fees for persons who were not called as witnesses. Fourth, he objects to the fees resulting from Barrow's failure to appear at a deposition she called.

The court disallows these expenses. First, in her reply brief, Barrow has made no attempt to show that these depositions were necessarily obtained for use in her case against Dr. Smith. Second, the court will not allow recovery of expenses for depositions on written questions that the court earlier found were unwarranted or for a nonappearance by the plaintiff.

Dr. Smith also objects generally to the remaining deposition expenses. He contends that Barrow is estopped from requesting deposition expenses contrary to the standards on which she relies in objecting to GISD's bill of costs. As the court notes below, Barrow objects to GISD's request for deposition expenses on the ground, *inter alia,* that GISD relies on letters from court reporters – ironically, the very same reporters on which Barrow relies – contending the letters are hearsay and that the best evidence of what GISD actually paid would be the invoices and copies of checks.

Although Barrow's position in objecting to GISD's bill of costs is inconsistent with the approach she has taken in her own fee application, Dr. Smith has not demonstrated that she is legally estopped on that basis from applying for the deposition expenses at issue. He has not preserved any other objections to the remaining deposition expenses, and the court overrules his objections except to the extent set forth above.[35] The court deducts $5,138.13 from the total claimed amount of $20,128.22 for deposition expenses, resulting in a net award of $14,990.09.

---

[35] Additionally, for reasons explained *infra* at § XII, the court has overruled Barrow's objections to GISD's request for reimbursement for deposition transcripts.

2

Barrow seeks $8,813.15 for office and vendor duplication (photocopies), including $8,661.20 through WCBA's records and $151.95 through Liberty's records. "Before the district court can tax costs for photocopies, it must find that the copies for which costs are sought were necessarily obtained for use in the litigation." *Holmes v. Cessna Aircraft Co.*, 11 F.3d 63, 64 (5th Cir. 1994) (per curiam). "Moreover, [Barrow] must offer some proof of the necessity." *Id.* Although Barrow is not required to "identify every xerox copy made for use in the course of legal proceedings," *Fogleman v. ARAMCO (Arabian American Oil Co.)*, 920 F.2d 278, 286 (5th Cir. 1991), she is expected to "demonstrat[e] that reproduction costs necessarily result from that litigation," *id.*

WCBA's records contain 79 pages of entries for photocopies; Liberty's photocopy entries are contained in seven pages of expenses. Each entry discloses the date, the person who made the copies, and the cost. With the exception of some of the Liberty entries, however, Barrow does not categorize the photocopies or otherwise indicate what was copied or how it was used. Beyond Bundren's broad statement that the expenses, including deposition expenses, "are reasonable and the type of expenses that lawyers in Dallas, Texas normally bill their clients," P. App. 46-47, Barrow has provided no information by which the

court can determine the necessity of the photocopies.[36] In *Wright* the court relied on similar reasoning to reject a request for reimbursement for photocopies. *See Wright*, 2004 WL 2870082, at *10 (declining to award such expenses where billing statements contained 33 pages of entries for photocopies and, although each entry contained date, person who made the copies, and cost, applicant did not categorize photocopies or otherwise indicate what was copied or how it was used and, beyond counsel's broad statement that all expenses were necessarily incurred in prosecuting lawsuit, she provided no information by which court could determine necessity of photocopies).

The court has determined from the Liberty records that the sum of $15.06 in photocopying expenses meets the controlling standard. The court therefore denies Barrow's request for office and vendor duplication expenses except in the amount of $15.06.

3

Barrow seeks court costs in the amount of $250. Her request is based on two entries: one on April 28, 2000 for $150 with the description "Filing Fees," P. App. 819, and one on May 10, 2000 for $100 with the

---

[36] Bundren also avers that he has written off $53,336.32 in duplication expenses during the period January 19, 2001 through June 30, 2003. P. App. 46.

description "Court Costs," *id.* Apart from these descriptions, Barrow submits no other evidence or explanation to support the costs. The court will allow the $150 filing fee but disallows the $100 nondescript court costs because Barrow has not met her "burden of furnishing a reasonable accounting." *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1099 (5th Cir. 1982), *overruled in part by J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 790 F.2d 1193, 1195 (5th Cir. 1988); *see also Wright*, 2004 WL 2870082, at *11.

B

Barrow argues in her reply brief that her expenses, including expert witness fees, that are limited by §§ 1920 and 1821 are recoverable as part of the attorney's fees under an amendment to the Civil Rights Act of 1991 ("CRA"). She posits in her brief and reply brief that reimbursement for out-of-pocket expenses incurred by the prevailing party's counsel and normally charged to fee-paying clients are part of the attorney's fees award and are not subject to §§ 1920 and 1821. Dr. Smith asserts in his ADR briefing and in his fee application briefing that, even if Barrow can recover out-of-pocket expenses that are not explicitly listed in § 1920, the expenses she seeks should be severely limited. He contends that §§ 1920 and 1821 limit the award of expert witness fees. The court addresses first whether the mediation fee, telecopy (facsimile) charges, attorney travel expenses, delivery/courier services fees, telephone charges, and courtroom equipment fees are otherwise recoverable.

In *Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish School Board,* 919 F.2d 374 (5th Cir. 1990), the Fifth Circuit held that "[a]ll reasonable out-of-pocket expenses, including charges for photocopying, paralegal assistance, travel, and telephone, are plainly recoverable in section 1988 fee awards because they are part of the costs normally charged to a fee-paying client." *Id.* at 380 (citing *Int'l Woodworkers of Am. v. Champion Int'l Corp.,* 790 F.2d 1174, 1185 (5th Cir. 1986); *Missouri,* 491 U.S. 274). Dr. Smith does not contest that expenses for mediation fees, telecopy (facsimile) charges, attorney travel expenses, delivery/courier services fees, telephone charges, and courtroom equipment fees are normally charged to a fee-paying client. The only expenses that Barrow currently claims, that have not already been addressed in this opinion (i.e., photocopying), and that Dr. Smith specifically challenges, are attorney travel expenses, facsimiles, and long distance. The amounts that Barrow now seeks for these expenses are considerably less than those at issue in the ADR procedure. Dr. Smith does not sufficiently explain in his present briefing why these requests are still objectionable.[37] Accordingly, the court awards Barrow

---

[37] In his fee application brief, Dr. Smith posits "regarding all other claimed expenses" that Barrow has failed to offer additional support beyond what she provided in the ADR procedure. D. Br. 23. He contends that, like Judge Sanders, the court lacks sufficient evidence to justify an award of expenses. This assertion is not a sufficient objection to these expense items. Dr. Smith also argues that, in Bundren's deposition, he admitted that his records do not show, in pertinent part, when

(Continued on following page)

reimbursement for these claimed expenses under § 1988.

C

Barrow seeks expert witness fees totaling $67,456.48 for four separate experts: David Sharp ("Sharp") – $906.25; LaBrec – $31,333.88; Dr. Burkman – $15,543.75; and Campbell – $19,672.60. Recovery of expert witness fees is governed by § 1920(6) (court appointed experts) and § 1821(a)(1) (addressing, *inter alia,* any witness in attendance at any court of the United States or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States). The maximum allowable fee under § 1821(b) is $40 per day for an expert who testifies at trial or by deposition, and it is error to award a prevailing party expenses for expert witnesses that exceed this amount. *See, e.g., Holmes,* 11 F.3d at 64 (vacating and remanding award that exceeded statutory allowable rate of $40 per day). "Additionally, expert fees are not recoverable." *Coats v. Penrod Drilling Corp.,* 5 F.3d 877, 891 (5th Cir. 1993) (citing 28 U.S.C. §§ 1821, 1920; *Crawford Fitting,* 482 U.S. 437).

Neither Sharp, LaBrec, nor Campbell testified at trial. Sharp and LaBrec each testified one day by

---

telecopy expenses were incurred. This deficiency does not question the reasonableness of such charges and whether a fee-paying client would reimburse counsel for them.

deposition. Dr. Burkman testified on two different days at trial and testified one day by deposition. Barrow is entitled to reimbursement at the rate of $40 per day for the trial and deposition testimony of these experts, totaling $200. *See* 28 U.S.C. § 1821(a)(1), (b).

Barrow contends that the fees of these experts are compensable under § 1988 as a result of the amendment made to § 1988 by the CRA. The CRA added subsection (c) to § 1988, explicitly providing for expert fees for parties prevailing on § 1981 and § 1981a claims. *See* CRA, Pub. L. No. 102-166, § 113, 105 Stat. at 1079. It does not include awarding expert fees in § 1983 cases. *See* § 1988(c). Because §§ 1920, 1821, and 1988(c) are all unavailing to Barrow, and because she directs the court to no other statutory authority under which she may be reimbursed, the court holds that Barrow cannot recover for expert witness expenses a sum greater than the $200 awarded based on § 1821(a)(1).

Based on the foregoing rulings, the court awards Barrow the following sums as expenses and taxable costs:

mediation fee	$1,316.00
deposition transcripts	$14,990.09
office and vendor duplication (photocopies)	$15.06
telecopies (facsimiles)	$87.07
filing fees/court costs	$150.00
attorney travel	$2,537.64
delivery/courier services	$0.00

expert witnesses	$200.00
telephone charges	$107.34
courtroom equipment	$3,372.02
TOTAL	$22,775.22

XII

The court now considers Barrow's objections to GISD's bill of costs. The clerk of court taxed GISD's costs in the amount of $19,741.13. Barrow objects to the award, contending the court should deny all costs requested or substantially reduce the costs awarded.

A

Barrow first objects to GISD's claim for $8,503.51 in photocopying expenses. She maintains that GISD has not shown their necessity for trial. In response, GISD asserts that the copying costs listed were all actual and necessary in preparation for trial, they were for pleadings and trial preparation, and the copies were itemized and broken down and presented in the standard custom and practice for practicing in this district. It posits that the shared costs are not being charged twice and that they were actual and necessary.

GISD's bill of costs includes seven pages of itemized photocopies that amount to $3,766.84 of her expenses. For the remaining $4,736.37 in joint reproduction costs, which represents photocopying that GISD shared with Dr. Smith, the bill of costs includes

tables that summarize the photocopying expenses by month but that do not in any way categorize how the photocopies were used. As did Barrow when requesting reimbursement for photocopying expenses, GISD has the burden to "demonstrate that reproduction costs necessarily result from th[e] litigation." *Fogleman,* 920 F.2d at 286. GISD need not identify every photocopy, *id.,* but the court must be able to find that the copies were necessarily obtained for use in the litigation, and GISD must offer some proof of the necessity, *see Holmes,* 11 F.3d at 64.

The court has considered, item by item, the seven pages of itemized photocopies and finds that GISD has met its burden with regard to $3,255.03 in photocopying expenses. The descriptions for these copies are sufficient, coupled with the court's knowledge of the case and its procedural history, to indicate to the court what was copied and how it was used. GISD has neither met its burden concerning the balance of the itemized expenses nor concerning the summarized expenses. Accordingly, the court sustains Barrow's objection to the extent that it allows $3,255.03 in photocopying costs of GISD's claim for $8,503.51.

B

GISD requests $11,237.62 for deposition transcripts provided by two court reporters. Barrow objects based on hearsay and best evidence grounds to GISD's reliance on the court reporter letters to support this request. This objection is misplaced.

28 U.S.C. § 1924 provides:

> Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

GISD's submission to the clerk of court complies with the statute. It is supported by the affidavit of Dennis J. Eichelbaum, Esquire, who states that he has personal knowledge of the facts stated, that the summaries and/or invoices for taxable costs are true and correct, and that they have been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed. Because GISD's submission satisfies § 1924, Barrow's hearsay and best evidence objections lack force.

Barrow also objects to the deposition expenses on the ground that GISD has not shown why they were necessary for trial. She contends that GISD did not notice or request any depositions, almost all witnesses at trial were GISD employees or Board members, and GISD's affidavit fails to provide details of the description why the copies were necessary for trial. She maintains that, if GISD paid for the original transcript of any witness, it was a gratuitous

expense because GISD could have made photocopies or obtained such copies from Dr. Smith.[38]

Costs related to obtaining stenographic copies of depositions are allowed if the materials were necessarily obtained for use in the case. *Wright,* 2004 WL 2870082, at *10. The court's review of the depositions in question indicates that they were necessary. GISD seeks reimbursement for copies of depositions of 27 witnesses and one telephonic court hearing. Of the 27 witnesses, 19 testified at trial. Four of the remaining witnesses gave depositions concerning attorney's fees. One witness was excluded by virtue of a trial ruling concerning the admissibility of evidence. Three other persons, whom Barrow deposed, did not testify at trial but were listed as possible witnesses. It was necessary that GISD obtain copies of all the depositions at issue. The court therefore overrules the objection.

Having considered Barrow's objections to GISD's costs, the court sustains in part and overrules in part the objections, reduces the taxable costs, and taxes GISD's costs against Barrow in the amount of $14,492.65.

---

[38] GISD demonstrates in its reply brief why it acted properly by paying court reporters for stenographic copies rather than making or obtaining photocopies.

XIII

Based on the foregoing rulings, the court grants the deferred portion of Barrow's April 11, 2005 post-trial motion to alter or amend the judgment to the extent of awarding Barrow her expenses and taxable costs of court against Dr. Smith. The motion is otherwise denied in all respects.

* * *

For the reasons set out above, the court grants Barrow's application for attorney's fees from Dr. Smith to the extent set forth in this memorandum opinion and order, grants her motion to alter or amend the judgment to the extent of awarding Barrow her expenses and taxable costs of court against Dr. Smith, and sustains in part and overrules in part her objections to GISD's bill of costs. The court has filed an amended judgment today that gives effect to the rulings in this memorandum opinion and order.

SO ORDERED.

December 20, 2005.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	Civil Action No.
	§	3:00-CV-0913-D
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al.,	§	
	§	
	§	
Defendants.	§	

AMENDED JUDGMENT

(Filed Dec. 20, 2005)

The court filed memorandum opinions and orders granting in part and denying in part a motion to dismiss and motions for summary judgment filed by defendants Greenville Independent School District ("GISD") and Dr. Herman Smith ("Dr. Smith"). Thereafter, the parties tried this case to a jury, which returned a verdict partially in favor of plaintiff Karen Jo Barrow ("Barrow"), partially in favor of Dr. Smith, and in favor of GISD. In memorandum opinions and orders filed August 5, 2005 and today, the court granted in part and denied in part Barrow's motion to alter or amend the judgment.

For the reasons set out in memorandum opinions and orders filed July 14, 2000, April 18, 2002, January 7, 2005, August 5, 2005, and today, and based on the jury verdict, it is ordered and adjudged that Barrow recover judgment from Dr. Smith in the principal sum

of $15,455.00 for compensatory damages, together with prejudgment interest thereon at the rate of 3.31% per annum simple interest, which does not compound, from May 1, 2000 to March 24, 2005, and post-judgment interest thereon at the rate of 3.31% per annum. It is further ordered and adjudged that Barrow recover judgment from Dr. Smith in the principal sum of $20,000.00 for punitive damages, together with post-judgment interest thereon at the rate of 3.31% per annum. It is further ordered and adjudged that Barrow recover judgment from Dr. Smith for attorney's fees in the sum of $631,293.00, and for expenses and taxable costs of court in the sum of $22,775.22, together with post-judgment interest thereon at the rate of 3.31% per annum.

Barrow's action against GISD is dismissed with prejudice, and all relief that she seeks against GISD is denied. GISD's taxable costs of court in the sum of $14,492.65 are assessed against Barrow.

All relief that any party seeks in this lawsuit that is not awarded by this amended judgment is hereby denied.

Done at Dallas, Texas December 20, 2005.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW,	§	
Plaintiff,	§	
	§	
VS.	§	Civil Action No.
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al.,	§	3:00-CV-0913-D
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Aug. 5, 2005)

The parties tried this case to a jury, which returned a verdict in favor of plaintiff Karen Jo Barrow ("Barrow") and against defendant Dr. Herman Smith ("Dr. Smith") for $15,455.00 in compensatory damages and $20,000 in punitive damages, finding, *inter alia,* that Barrow had proved her parental rights claim. The jury found against Barrow as to her claims against defendant Greenville Independent School District ("GISD").[1] The court entered judgment, and

[1] The court has addressed the background facts and procedural history of this case in several prior opinions and will not do so in today's decision. It will instead do so as necessary below, in the context of addressing the dispositive issues that the motions present. The court assumes the parties' familiarity with the facts and procedural history.

all parties have filed post-judgment motions,[2] most of which the court decides today and some of which – those that are affected by whether (or to what extent) Barrow is entitled to recover attorney's fees and costs – the court defers to consider additional submissions.

I

Both Barrow and Dr. Smith assert in their post-trial motions various arguments that depend explicitly on the jury's finding that Dr. Smith is liable to Barrow on her parental rights claim but not on her religious rights claim. The court will consider the arguments together.

A

In the court's charge, it instructed the jury that "[p]ublic school employees have rights protected under the Constitution of the United States to choose to educate their children in private school, including a private school that provides a religious education."

---

[2] The following motions are the subject of this memorandum opinion and order: (1) GISD's April 6, 2005 motion for attorney's fees; Dr. Smith's April 8, 2005 motions (2) for new trial, (3) for judgment as a matter of law, (4) to alter or amend judgment, and (5) for attorney's fees; (6) Barrow's April 11, 2005 preliminary motion for attorney's fees and (7) post-trial motion to alter or amend judgment and for judgment as a matter of law; and (8) Barrow's May 5, 2005 request for *Dondi* conference. Also pending for decision is Barrow's April 13, 2005 objections to GISD's bill of costs. The court will defer deciding the objections.

Ct. Charge at 7. The court explained that public school employees "have parental rights under the First and Fourteenth Amendments to direct their children's educations, and they have the right under the Free Exercise Clause of the First Amendment to freely exercise their religious faith by choosing to educate their children in a religious educational institution." *Id.* It also instructed the jury that Barrow did not "have to prove that any action taken against her was because of her religion." *Id.* In asking the jury to determine whether Barrow had proved her "parental and/or religious rights claim" against Dr. Smith, the court directed the jury to make separate findings on Barrow's parental rights claim and religious rights claim. *Id.* at 11. The jury found that Barrow had proved her parental rights, but not her religious rights, claim.

Barrow argues in her motion to alter or amend judgment and motion for judgment as a matter of law that she is entitled to judgment on her religious rights claim. She maintains that the jury found that the exercise of her parental right to choose a private school for her children was a motivating factor in Dr. Smith's decision not to interview or promote her, and that having reached this conclusion, the only way the jury could have come to a different result on her religious rights claim would be if it concluded that her decision was not made based on her religious faith. Barrow posits that the evidence was undisputed that her decision to choose the Greenville Christian School for her children was an exercise of

her religious faith. She urges that the judgment be modified to reflect that Dr. Smith violated both her parental and religious rights, arguing that her exercise of this legal right was one and the same.

Dr. Smith maintains in his motion to alter or amend judgment that, because the jury denied what he calls Barrow's "Free Exercise claim," his conduct is subject to rational basis scrutiny, which obligated Barrow to prove that the restriction at issue here – conditioning her employment on the enrollment of her children in public school – was not reasonable. He argues that, under rational basis review, his conduct was permissible, and that he is therefore entitled to judgment as a matter of law on Barrow's parental rights claim.

B

Dr. Smith's position is premised on two separate arguments. First, he posits that the Fifth Circuit's decision in *Barrow v. Greenville Independent School District,* 332 F.3d 844 (5th Cir.) ("*Barrow*"), *cert. denied,* 540 U.S. 1005 (2003), can be read to call for a heightened level of scrutiny concerning Barrow's claim. He argues, however, that if *Barrow* subjects claims that involve solely parental rights to a heightened level of scrutiny, it would conflict with *Littlefield v. Forney Independent School District,* 268 F.3d 275 (5th Cir. 2001). In *Littlefield* the panel applied a rational basis test in upholding a school district's mandatory dress code against claims by parents that

the code violated "their 'fundamental right' to control the upbringing and education of their children." *Id.* at 282, 288, 291. Dr. Smith posits there is no conflict between *Barrow* and *Littlefield* because, in *Barrow,* the court noted that a violation of the Free Exercise Clause was also alleged. Citing the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), Dr. Smith argues that, if a claim involves both a violation of a parent's right to direct the education of her children and the parent's free exercise rights, it could be referred to as a "hybrid rights" claim and might be entitled to a heightened level of scrutiny. *See id.* at 881 (noting that "[t]he only decisions in which [the Court has] held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press[.]"). Dr. Smith argues that because the jury rejected Barrow's "Free Exercise claim," she does not have a "hybrid rights" claim and therefore is not entitled to the heightened level of scrutiny the Fifth Circuit arguably applied in *Barrow.*

Alternatively, Dr. Smith maintains that rational basis scrutiny is appropriate even if Barrow's claims can be categorized as "hybrid rights" claims. He argues that *Barrow* is not binding as to the appropriate level of scrutiny because the panel specifically limited its holding to whether there is a "recognized

constitutional right," *Barrow,* 332 F.3d at 847, and it specifically noted that it was not addressing the question of the appropriate level of scrutiny. Dr. Smith also points to Judge Maloney's decision in *Littlefield v. Forney Independent School District,* 108 F.Supp.2d 681 (N.D. Tex. 2000), *aff'd,* 268 F.3d 275 (5th Cir. 2001), in which he declined to apply heightened scrutiny in a case that presented a "hybrid rights" situation, where the plaintiffs asserted not only a violation of their parental rights but also their rights under the Free Exercise Clause. *See Littlefield,* 108 F.Supp.2d at 689, 706-07. In doing so, the court contrasted the claims at issue in the case before it from those in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), recognizing that in *Yoder* the Court "observed that there was 'strong evidence' in the record of a 'sustained faith pervading and regulating respondents' entire mode of life,'" and that "[i]n the *Yoder* Court's mind, the Amish parents had made a 'convincing showing, one that probably few other religious groups or sects could make[.]'" *Id.* at 706-07 (quoting *Yoder,* 406 U.S. at 219, 235-36). Dr. Smith argues that Barrow did not have a high level of evidentiary support and that she in fact lost on her "Free Exercise claim."

A brief overview of the procedural history of the instant case helps explain why the court declines to accept Barrow's and Dr. Smith's arguments. As the Fifth Circuit recognized in *Barrow,*

> [i]n her [first amended complaint], Barrow argued that Smith violated her right to

> select a private-school education for her children as guaranteed by the First Amendment and "the penumbra of familial privacy rights" (count I); her right under the Due Process Clause of the Fourteenth Amendment to direct the upbringing of her children (count II); and her right under the Free Exercise Clause of the First Amendment to provide a religious education for her children (count III).

Barrow, 332 F.3d at 846-47 (emphasis omitted). In his motion for summary judgment based on qualified immunity, Dr. Smith argued that Barrow could not establish that she was discriminated against on the basis of her religious beliefs. In her response, Barrow maintained that her rights to the free exercise of her religion were clearly established in July 1998. As part of her argument, Barrow quoted the Supreme Court's decision in *Employment Division* in advancing the contention that "when the 'Free Exercise Clause [is viewed] in conjunction with other constitutional protections,' then, in those situations 'the First Amendment bars application of a neutral, generally applicable law to religiously motivated action.'" P. Resp. Br. at 30-31 (quoting *Employment Div.*, 494 U.S. at 881). She asserted that, "[i]n these types of 'hybrid' cases, the Supreme Court in [*Employment Division*] reaffirmed the applicability of the First Amendment's bar to a neutral law of general applicability which had the effect of burdening religiously motivated actions." *Id.* at 31. Apparently advocating the application of strict scrutiny to Dr. Smith's

conduct, Barrow argued that he did not advance a compelling state interest in his brief, and she contended that his failure to do so "doom[ed]" his argument that there was no "religious discrimination." *Id.*

In deciding Dr. Smith's motion for summary judgment, the court considered Barrow's free exercise claim separately from her parental rights claim. It concluded that "Dr. Smith's school attendance requirement constituted a neutral, generally applicable regulation that was not enacted to inhibit a particular faith or religion in general[,]" and that, as a result, "it 'will withstand a free exercise challenge when the regulation is reasonably related to a legitimate state interest.'" *Barrow v. Greenville Indep. Sch. Dist.*, 2002 WL 255484, at *4 (N.D. Tex. Feb. 20, 2002) (Fitzwater, J.) ("*Barrow I*"), *rev'd,* 332 F.3d 844 (5th Cir.), *cert. denied,* 540 U.S. 1005 (2003).

Although this court dealt with Barrow's free exercise claim separately, the Fifth Circuit in *Barrow* did not. As mentioned above, the panel noted Barrow's separate counts in her amended complaint, but it considered the three claims in tandem, observing that "at bottom all aver that Barrow, a public-school employee, has a constitutionally-protected right to select a private-school education for her children." *Barrow,* 332 F.3d at 847. The panel explained that its "inquiry at this stage is limited to the question whether there is a recognized constitutional right and not whether that right is grounded in the First Amendment, the Fourteenth Amendment, or both." *Id.* Relying on its decisions in *Brantley v. Surles,* 718

F.2d 1354 (5th Cir. 1983), and *Fyfe v. Curlee,* 902 F.2d 401 (5th Cir. 1990), the panel held that "the constitutional right of public-school employees to select a private-school education for their children was clearly established when Smith refused to consider Barrow for the position of assistant principal." *Id.* at 848.

It is evident from Dr. Smith's arguments in his motion to alter or amend judgment that he is mistaken concerning the nature of Barrow's religious rights claim that the court submitted to the jury. He sees it as a form of stand-alone free exercise claim. Instead, the court viewed the First Amendment Free Exercise Clause as but one of two constitutional predicates (the other being the parental rights guaranteed by the First and Fourteenth Amendments) for the right articulated in *Barrow* of a public school employee to select a private school education for her children. Although the court separated these predicates in the jury charge and gave them the labels "Parental Rights Claim" and "Religious Rights Claim," it followed this approach to give effect to the principle set out in cases like *P & L Contractors, Inc. v. American Norit Co.,* 5 F.3d 133 (5th Cir. 1993). *See id.* at 138 ("Where the law recognizes alternative or overlapping theories of recovery, the court must properly condition the interrogatories to minimize the possibility of conflicting or overlapping verdicts.") (citing John R. Brown, *Federal Special Verdicts: The Doubt Eliminator,* 44 F.R.D. 338, 340 (1969)). Under the Fifth Circuit's decision in *Barrow,* a finding in Barrow's favor on either predicate is sufficient to

establish that Dr. Smith violated the right that the panel identified was clearly established at the time of Dr. Smith's decision: her right, as a public school employee, to select a private school education for her children. Had the court intended to submit an independent free exercise claim, it would have instructed the jury on the law that pertained to such a claim, including the appropriate level of scrutiny to apply to Dr. Smith's conduct. This would have required the court to determine, as did the *Littlefield* court, whether to apply a "hybrid rights" theory to her free exercise claim, resulting either in the application of strict scrutiny or rational basis review. Such a determination was unnecessary, however, because the court did not submit an independent free exercise claim to the jury. The court decided that, because the Fifth Circuit's *Barrow* opinion made clear that Dr. Smith was not entitled to qualified immunity concerning Barrow's parental rights claim as a public school employee (with its two constitutional origins), it would submit that claim to the jury. If Barrow could prove the claim, it would provide her the relief she sought under 42 U.S.C. § 1983, without requiring that the trial exceed the scope of the qualified immunity issue that the Fifth Circuit had already resolved. From the standpoint of judicial efficiency, it was unnecessary to complicate the trial with other claims and defenses that, even if resolved in Barrow's favor, would not afford her any greater relief than her parental rights action would provide.

C

In view of the foregoing, the court also denies Barrow's motion that it modify the judgment to reflect a finding of liability on Barrow's religious rights claim. First, the judgment itself need not be altered or amended because it says nothing about the basis for entering judgment, and no changes need be made to the relief granted by the judgment. Second, the court need not do so because the jury ruled in Barrow's favor concerning the right that was at issue after the Fifth Circuit's qualified immunity decision – her right, as a public school employee, to choose a private school education for her children. Her "religious rights," as protected by the First Amendment Free Exercise Clause, served as one predicate for that right.[3]

Dr. Smith attempts in his motion to alter or amend judgment to shift the burden to Barrow of showing that the patronage policy was unreasonable. This effort is precluded, however, by the Fifth Circuit's decision in *Barrow,* which is the law of the case. Although the panel stated that it was expressing "no opinion on the particular degree of scrutiny a state

---

[3] Because the court declines to alter or amend the judgment to reflect a finding for Barrow on her religious rights claim, the court need not address Dr. Smith's and GISD's arguments in their responses to her motion to alter or amend judgment and judgment as a matter of law that Barrow is not entitled to judgment on her religious rights claim pursuant to Fed. R. Civ. P. 59(e) because it is not a proper avenue for determining evidentiary sufficiency.

action must undergo to withstand a challenge to its constitutionality in a case like this one," it explicitly recognized "that the state cannot strip its school employees of the right to choose a private-school education for their children without proving that the unfettered exercise of this right will undermine a state interest." *Barrow,* 332 F.3d at 849 n.20. *Barrow* placed the burden squarely on Dr. Smith to show that his actions were not unreasonable. Recognizing that its decisions in *Brantley* and *Fyfe* "leave no doubt that public-school employees like Barrow have a protected right to educate their children in private school," the panel explained that "[t]he state cannot take an adverse employment action against a public-school employee for exercising this right unless it can prove that the employee's selection of private school materially and substantially affects the state's educational mission." *Id.* at 848.[4] The requirement that the state make such a showing does not appear to be dependent on the existence of a "hybrid right." The court in *Fyfe* required the government to make such a showing even though no religious rights were at issue. *See Fyfe,* 902 F.2d at 405 ("Because the school district produced no evidence of substantial interference with its effectiveness as a result of Mrs. Fyfe's enrollment

---

[4] In her response to Dr. Smith's motion, Barrow equates the standard that the *Barrow* panel articulated with the application of strict scrutiny. Like *Barrow,* this court need not specify the level of scrutiny applicable in this case. It is sufficient to say that *Barrow* held that Dr. Smith had the burden of showing material and substantial impairment.

of her daughter in private school, Mrs. Fyfe must prevail as a matter of law."). Accordingly, the court holds that Dr. Smith had the burden to show that his actions were justified, and that the placement of this burden on him is unaffected by the jury's determination as to Barrow's religious rights claim.

Accordingly, neither Dr. Smith nor Barrow is entitled to relief on the grounds asserted.

II

The court now addresses the additional arguments that Barrow raises in her motion to alter or amend judgment and motion for judgment as a matter of law.

The court is authorized to alter or amend judgment under Fed. R. Civ. P. 59(e) "to correct a clear error of law or prevent manifest injustice." *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (5th Cir. 2002) (quoting *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998)). "A court may enter judgment as a matter of law under Rule 50 only where there exists 'no legally sufficient evidentiary basis for a reasonable jury to find' otherwise." *Gaia Techs., Inc. v. Recycled Prods. Corp.*, 175 F.3d 365, 371 (5th Cir. 1999) (quoting Rule 50(a)(1)).[5]

---

[5] Although Dr. Smith and GISD argue in their responses to Barrow's motion that she has waived any challenge under Rule

(Continued on following page)

A

Barrow argues that the judgment should be altered to reflect that GISD is liable to her under § 1983. Reasserting an argument that she has advanced unsuccessfully before, Barrow essentially posits that because Dr. Smith was the final decisionmaker concerning whom to interview and recommend for promotion, his decision to deny her an interview should be imputed to GISD. She maintains that the undisputed evidence at trial established that GISD delegated to Dr. Smith final decisionmaking authority to decide whom to interview and recommend for promotion.

As a basis for her argument, Barrow again attempts to rely on *Coggin v. Longview Independent School District,* 289 F.3d 326 (5th Cir. 2002), *vacated pending en banc review,* 309 F.3d 307 (5th Cir. 2002) (en banc). She persists in citing and discussing the *Coggin* panel opinion as if it were binding Fifth Circuit authority. During the trial, although the court had no occasion to announce that it was doing so, it declined to rely on Barrow's arguments to the extent based on the *Coggin* panel opinion. Because Barrow continues to cite the panel opinion as if it were controlling – in fact, she mistakenly asserts that "[t]he panel decision in *Coggin* was affirmed *en banc* by the

---

50 because she did not urge her arguments at trial, the court need not address this contention. As the court will explain, the arguments Barrow asserts that are appropriate for a motion for judgment as a matter of law fail for other reasons.

Fifth Circuit," P. Mot. at 8 – the court now addresses whether the panel opinion is binding on this court.

It is well settled that, when the Fifth Circuit grants rehearing *en banc,* the panel opinion is vacated and has no precedential value. 5th Cir. R. 41.3 provides: "[u]nless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate." *See, e.g., Soffar v. Cockrell,* 300 F.3d 588, 590 (5th Cir. 2002) (en banc) ("We granted rehearing en banc, thereby vacating the panel opinion." (citing Rule 41.3)); *United States v. Pineda-Ortuno,* 952 F.2d 98, 102 (5th Cir. 1992) (observing that rehearing en banc had been granted in cited case and that, as a result, "the panel decision is vacated and of no precedential value." (citing Rule 41.3)). There is nothing in the court's order in *Coggin* granting rehearing *en banc* that indicates that the Fifth Circuit did not intend for the rule to apply. *See Coggin,* 309 F.3d at 308.

Nor is Barrow correct in asserting that the *en banc* Fifth Circuit "affirmed" the panel opinion. The *en banc* Fifth Circuit sometimes reinstates a panel opinion, in whole or in part, but when it does, it does so explicitly. *See, e.g., United States v. Herrera,* 313 F.3d 882, 885 (5th Cir. 2002) (en banc) (per curiam) ("[T]he applicable portions of the panel opinion are reinstated." (citation omitted)); *Soffar,* 300 F.3d at 590 ("We reinstate the rulings of the panel concerning the grant or denial of COA as to all issues raised by Soffar."). The *en banc Coggin* court neither explicitly

reinstated the panel opinion nor "affirmed" the panel. Nowhere in the *en banc* opinion is there any explicit reinstatement of any part of the panel opinion. And while the *en banc* court did affirm, it "affirm[ed] *the judgment of the district court.*" *Coggin v. Longview Indep. Sch. Dist.*, 337 F.3d 459, 460 (5th Cir. 2003) (en banc) (emphasis added); *see also id.* at 466 ("[W]e AFFIRM *the judgment of the district court.*" (emphasis added)). Accordingly, even if the panel opinion in *Coggin* supports Barrow's argument, which the court need not decide, it is not binding on this court.

With the *Coggin* panel opinion placed in its proper non-precedential context, the court now addresses Barrow's argument, concluding that it lacks merit under established Supreme Court precedent and the law of this circuit. For purposes of attaching § 1983 liability to a governmental entity based on the actions of an employee, there is an important distinction to be drawn between those instances where the employee acts as a policymaker as those where he acts simply as a decisionmaker. *See, e.g., Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247-48 (5th Cir. 2003) (recognizing that "[m]unicipal liability under 42 U.S.C. § 1983 requires proof of . . . a policymaker," and observing that a "delegation of decisionmaking authority [under a particular provision of the Texas Education Code] does not negate the fact that . . . final policymaking authority lies exclusively with the Board."); *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1246 (5th Cir. 1993) (noting that the Supreme Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469

(1986), and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), "distinguished between those having mere *decisionmaking* authority and those having *policymaking* authority." (emphasis in original)). In *Pembaur* the Supreme Court recognized

> that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official – even a policymaking official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law.

Pembaur, 475 U.S. at 481-83 (footnotes and citation omitted).

The *Jett* court relied on *Pembaur* in reaching its decision. *See Jett*, 7 F.3d at 1246-47. In *Jett* a high school teacher and coach brought a § 1983 action against the district that employed him when the district Superintendent ordered him transferred to a

school where his position would not involve coaching duties. *Id.* at 1242-43. The plaintiff alleged that, before the Superintendent approved the recommendation, he informed him that his Principal's transfer recommendation, on which the transfer was based, was racially motivated. *Id.* at 1243. The court noted that the school district Board of Trustees took no action regarding the transfer. *Id.* The plaintiff in *Jett* argued that the district Trustees "had delegated final policymaking authority as to employee transfers" to the Superintendent and pointed to evidence that supported the conclusion that the Superintendent was the final decisionmaker regarding the transfer. *Id.* at 1246. The court observed, however, that the fact "that [the Superintendent] may have been delegated the final decision in the cases of protested individual employee transfers does not mean that he had or had been delegated the status of policymaker, much less final policymaker, respecting employee transfers." *Id.* The court ultimately held that the evidence was "not sufficient to support a finding that [the Superintendent] possessed final policymaking authority in the area of employee transfers," and that, under Texas law, such authority was vested in the district's trustees, and there was "no evidence they had delegated it to [the Superintendent]." *Id.* at 1251. An example from *Pembaur* that the *Jett* court quoted also helps to explain why Barrow's argument is insufficient to establish that GISD is liable under § 1983. In *Pembaur* the Supreme Court explained that

> the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability.

Pembaur, 475 U.S. at 484 n.12 (emphasis omitted), *quoted in Jett,* 7 F.3d at 1247.

This court held in deciding GISD's motion for summary judgment that "under the revised Texas Education Code, the GISD Board – not the Superintendent – establishes policy concerning the eligibility requirements for a person to be interviewed for an administrator position." *Barrow v. Greenville Indep. Sch. Dist.*, 2002 WL 628665, at *3 (N.D. Tex. Apr. 18, 2002) (Fitzwater, J.) ("*Barrow II*"). Thus as *Jett* and *Pembaur* make clear, even if the undisputed trial evidence established that GISD delegated final *decisionmaking* authority to Dr. Smith regarding whom to interview and recommend for promotion, this is insufficient of itself to attach liability to GISD

under § 1983 for Dr. Smith's actions.[6] Accordingly, GISD cannot be held liable based on Dr. Smith's exercise of decisionmaking authority.

B

Barrow also contends that the court erred in refusing to grant her costs against Dr. Smith and in taxing GISD's costs against her. She argues that equity requires that she recover her costs because she won her case. Barrow's arguments concerning Dr. Smith will be considered later in this opinion, in conjunction with those in her preliminary motion for attorney's fees. The court thus turns to the question whether GISD was entitled to recover its taxable costs from Barrow and holds that it was.

Citing *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 430 (5th Cir. 2000), Barrow maintains that it is manifestly unjust to refuse to award costs to a prevailing civil rights plaintiff, and require her to pay them, when defendants are represented by the same insurance company and organized a joint defense, but ultimately lost. *Byers* does not support, or even speak to, her argument.

---

[6] Although Barrow also attempts to rely on the Supreme Court's decision in *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), her effort is misplaced. There the respondent contended that the Sheriff took the action that served as the basis for liability for the county. *Id.* at 401. The county stipulated that the Sheriff was the county's policymaker "regarding the Sheriff's Department." *Id.*

Barrow also argues that an award of costs to a prevailing defendant is the exception rather than the norm in a civil rights case. The cases she cites do not support her contention. Two of them – *Casa Marie Hogar Geriatrico, Inc. v. Rivera-Santos,* 38 F.3d 615 (1st Cir. 1994), and *Hughes v. Rowe,* 449 U.S. 5 (1980) – pertain to the shifting of attorney's fees, not costs. *See Casa Marie,* 38 F.3d at 618 ("In civil rights cases, *fee-shifting* in favor of a prevailing plaintiff is the rule, whereas *fee-shifting* in favor of a prevailing defendant is the exception." (emphasis added)); *Hughes,* 449 U.S. at 15 ("[A] plaintiff should not be assessed his opponent's *attorney's fees* unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." (emphasis added) (quoting *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 422 (1978))). The other case Barrow cites likewise fails to support her argument. Although the court in *Association of Mexican American Educators v. California,* 231 F.3d 572 (9th Cir. 2000), did affirm the district court's refusal to award costs to the defendant, the denial of costs appeared to depend heavily on the unique circumstances of the case rather than on a presumption against awarding costs to defendants in civil rights cases. *See id.* at 593. In fact, the court explicitly stated that it did not "mean to suggest that the presumption in favor of awarding costs to prevailing parties does not apply to defendants in civil rights actions." *Id.*

The Fifth Circuit has recognized that "[p]ursuant to Fed. R. Civ. P. 54(d), except when provided otherwise by statute or rule, 'costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs.'" *Wilson v. City of Plano,* 160 F.3d 211, 212 (5th Cir. 1998) (per curiam). It has also stated that "Rule 54(d) creates 'a strong presumption that the prevailing party will be awarded costs[.']" *Id.* (quoting *Schwarz v. Folloder,* 767 F.2d 125, 131 (5th Cir. 1985)). Accordingly, the court holds that GISD – which prevailed against Barrow in this lawsuit – is entitled to recover its taxable court costs.

III

The court now turns to some of Dr. Smith's other arguments in his motions to alter or amend the judgment, for new trial, or for judgment as a matter of law.

A

Dr. Smith advances several arguments in support of his contention that he is entitled to qualified immunity. He asserts essentially the same arguments in his motion for new trial and posits that he should have been allowed to present evidence at trial in support of his qualified immunity defense.

The court "has discretion to grant a new trial under Rule 59(a) of the Federal Rules of Civil Procedure when it is necessary to do so 'to prevent an injustice.'" *Gov't Fin. Servs. One Ltd. P'ship v. Peyton Place, Inc.*, 62 F.3d 767, 774 (5th Cir. 1995) (quoting *United States v. Flores*, 981 F.2d 231, 237 (5th Cir. 1993)). New trials can be granted under Rule 59 "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States[.]" Rule 59(a). The rule "confirms the trial court's historic power to grant a new trial based on its appraisal of the fairness of the trial and the reliability of the jury's verdict." *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 612-13 (5th Cir. 1985). "A new trial may be granted, for example, if the district court finds the verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course." *Id.* at 613 (footnotes omitted).

Dr. Smith's contention in his motion to alter or amend judgment that the Fifth Circuit's decision in *Barrow* did not preclude him from asserting qualified immunity cannot withstand scrutiny. Assuming *arguendo* that the *Barrow* panel did not do so in any other context, it certainly settled the issue of Dr. Smith's non-entitlement to qualified immunity concerning the cause of action that the court submitted to the jury: Barrow's claim that Dr. Smith violated her right as a public school employee to educate her children in private school. The court need not

therefore individually address the arguments in Dr. Smith's motions, because each is foreclosed under the law of the case.

In *Barrow* the Fifth Circuit reversed this court's decision that Dr. Smith was entitled to summary judgment on the basis of qualified immunity. *See Barrow,* 332 F.3d at 846. The panel held that "public-school employees like Barrow have a protected right to educate their children in private school." *Id.* at 848. It concluded that "[t]he state cannot take an adverse employment action against a public-school employee for exercising this right unless it can prove that the employee's selection of private school materially and substantially affects the state's educational mission." *Id.* The panel held that "[b]ecause Smith failed to present a fact issue that Barrow's children's attendance of a private school would negatively impair district operations were Barrow selected for assistant principal, *the violation of a constitutional right is shown.*" *Id.* (emphasis added). This use of unequivocal language, considered in conjunction with the conspicuous absence of language similar to that used on other occasions by the Fifth Circuit to indicate that a party was not foreclosed from litigating an issue in future proceedings, foreclosed Dr. Smith from relying on the defense of qualified immunity at trial. *See, e.g., Harper v. Harris County, Tex.,* 21 F.3d 597, 599, 601 (5th Cir. 1994) (affirming trial court's denial of summary judgment based on qualified immunity and noting that "[o]f course, [the defendant] still may assert qualified immunity at trial. We express no

view as to the facts that may be established at trial or as to the legal significance of those facts."); *Edwards v. Cass County, Tex.*, 919 F.2d 273, 277 (5th Cir. 1990) ("Out of an abundance of caution, however, we note that the defendants still may assert qualified immunity at trial. We express no view as to whether defendants in fact are entitled to such immunity." (citation omitted)); *McCuen v. Home Ins. Co.*, 633 F.2d 1150, 1152 (5th Cir. Unit B Jan. 1981) (per curiam) ("Because the case was decided on summary judgment on the basis of *Price v. Maryland Casualty Co.*, there was no determination made by the district court as to whether plaintiff was in fact discharged because of his age. . . . We reverse the grant of summary judgment and remand to the district court for further consideration. We express no view as to the proper outcome of this case on remand."). The *Barrow* panel used no similar language. And, as noted, this court on remand submitted the case to the jury only on the basis of the right that the *Barrow* panel addressed. It did not permit Barrow to stray into, or instruct the jury on, claims for which Dr. Smith might arguably be entitled to qualified immunity.

For these reasons, the court denies Dr. Smith's motions to alter or amend the judgment or for a new trial on the basis that he is entitled to qualified

immunity or should have been allowed to present evidence in support of this defense.[7]

B

Dr. Smith also argues that Barrow is not entitled to punitive damages or, alternatively, that the punitive damages award should be reduced. This argument also serves as the basis for his motion for judgment as a matter of law. He also advances arguments pertaining to punitive damages in his motion for new trial.

1

In his motion to alter or amend judgment, Dr. Smith argues that Barrow is not entitled to punitive damages because she did not properly plead them, and that such an award would violate his right to due process. He asserts essentially the same argument in his motion for judgment as a matter of law. It appears clear that, in this context, Dr. Smith is alleging a violation of his right to procedural due process.

In *Barrow v. Greenville Independent School District,* 2005 WL 39086 (N.D. Tex. Jan. 7, 2005)

---

[7] In his motion for judgment as a matter of law, Dr. Smith also argues that the award of punitive damages against him should be stricken or reduced because he was not allowed to present evidence and obtain a jury issue regarding qualified immunity or the extraordinary circumstances exception. These arguments fail for the reasons already discussed.

(Fitzwater, J.) ("*Barrow III*"), the court allowed Barrow to file a third amended complaint to seek punitive damages against Dr. Smith and granted him leave to depose her on this claim. *Id.* at *8. Dr. Smith's challenge is based on two arguments. First, he posits that Barrow's late amendment denied him the opportunity to prepare sufficiently for, and respond to, her claim for punitive damages. He contends that, until two months before trial, he was not on notice that Barrow would be allowed to claim punitive damages, and that he was not provided an adequate opportunity to conduct discovery and prepare for trial on this issue. Second, he argues that the late amendment was unduly prejudicial because he relied on Barrow's live pleadings in making his Rule 68 offers of judgment. These contentions lack force.

As *Barrow III* makes clear, Dr. Smith had sufficient notice well before the court allowed Barrow to seek punitive damages that he might be required to defend against a claim for such damages. Although the court recognized that Barrow's first amended complaint did not put Dr. Smith on notice that she was seeking punitive damages, it also pointed to the fact that Barrow had served both defendants with an amended response to interrogatories on July 19, 2001, wherein she gave notice that she intended to seek punitive damages. *Id.* at *8. As the court explained, Dr. Smith received this notice approximately 40 days before discovery closed. *Id.* The court also observed that, on September 4, 2001, Barrow sought leave to amend her complaint, and her proposed

complaint included a request for punitive damages. *Id.* Although the court denied her motion, it did so without prejudice. *Id.* Dr. Smith might not have known indubitably until *Barrow III* that Barrow would be allowed to seek punitive damages, but the court's reasoning shows that he knew as early as July or September 2001 – over three years before the court's decision in *Barrow III* – that a claim for punitive damages might enter the case. He could have conducted discovery that would have related to the propriety and amount of punitive damages after Barrow's July 2001 interrogatory responses reflected her intent to seek them, because discovery had not yet closed. And even if he should not have done so then, in *Barrow III* the court explicitly granted Dr. Smith the opportunity to depose Barrow on punitive damages. Although Dr. Smith appears to argue in his motion to alter or amend judgment that this was insufficient, he does not identify any information that he needed to prepare for trial that he was unable to acquire from Barrow's deposition or from evidence already available to him[8] Additionally, he does not explain why the opportunity to depose Barrow was inadequate to prepare him to defend against her

---

[8] Dr. Smith complains about obstructionist tactics undertaken by Barrow and her attorney during her deposition and includes excerpts from it. Even if Barrow and her attorney's conduct at the deposition was improper – a question the court does not reach – Dr. Smith still fails to explain specifically why this behavior prevented him from adequately preparing to defend Barrow's punitive damages claim.

claim. Without this explanation, the court cannot conclude that Dr. Smith's right to procedural due process was violated. Finally, Dr. Smith did not move for a trial continuance in order to address the issue of punitive damages.

Dr. Smith's argument that he was prejudiced by the late addition of a punitive damages claim because he relied on Barrow's live pleadings in making his offer of judgments also fails to show that his right to due process was violated. If this rationale were accepted, the right under Rule 15(a) to amend one's pleadings could be subject to due process challenges in many cases in which Rule 68 offers of judgment have been made. This position is not supported by recognized procedural due process concepts.

Additionally, Dr. Smith himself raised the issue of the propriety of the punitive damages claim in his second motion for summary judgment, filed November 5, 2004. In considering the parties' arguments in relation to Dr. Smith's motion, the court permitted Barrow to file a third amended complaint to seek punitive damages. Dr. Smith had an adequate opportunity to present in his briefing his argument against her punitive damages claim.

Because Dr. Smith was given an adequate opportunity to be heard on this issue, his right to due process was not violated.

2

Dr. Smith also argues that a punitive damages award against him violates his substantive due process rights. He contends that he was not given fair notice that his alleged actions would subject him to punitive damages. He maintains that it violates his rights to subject him to such damages for conduct that numerous school officials, the Texas Association of School Boards ("TASB"), school lawyers, judges, and even this court believed was legal.[9] He also complains that the parental rights claim at issue in this case had only been vaguely defined as to its content, had not been specifically defined as to its textual source in the Constitution, and had not been specifically defined as to the applicable level of scrutiny.

---

[9] Dr. Smith's assertion that this court considered his conduct *to be legal* is inaccurate. The court concluded that Dr. Smith was entitled to qualified immunity because "it was not clearly established in July 1998 that the school patronage requirement at issue violated [the] rights" that Barrow asserted, and because

> [a] reasonable Superintendent could have concluded that it was constitutional in July 1998 to condition a public school administrator's employment on sending her children to public school, once the Superintendent determined that not imposing such a restriction would materially and substantially impede the operation and effectiveness of the educational program.

Barrow I, 2002 WL 255484, at *5-*6. Rather than concluding that Dr. Smith's conduct was legal, the court held that Barrow had alleged a violation of her parental and free exercise rights. *See id.* at *3-*4.

Although Dr. Smith posits a violation of his substantive due process rights, he appears to complain about inadequate notice. Thus his arguments are more accurately construed as pertaining to procedural due process. Like his arguments related to qualified immunity, these contentions are foreclosed by the law of the case. In *Barrow* the panel held that "no reasonable official could conclude that the application of the school district's public-school patronage policy to Barrow was constitutional." *Barrow,* 332 F.3d at 849. Although Dr. Smith seems to argue that the Fifth Circuit's decision does not reflect reality and should not be considered in relation to punitive damages (even if it applies in the context of qualified immunity), the panel's decision is the law of the case, and this court is obligated to follow it. Any evidence that Dr. Smith would have offered at trial to prove that other officials, lawyers, or judges believed that a patronage policy such as the one at issue here was legal would conflict with the Fifth Circuit's unequivocal ruling to the contrary.

Moreover, although Dr. Smith appears to posit that his due process rights were somehow violated by the fact that the parental rights claim had not been defined either in its content or in its textual source, the Fifth Circuit's decision in *Barrow* holds that *Brantley* and *Fyfe* "confirm that the constitutional right of public-school employees to select a private-school education for their children was clearly established when Dr. Smith refused to consider Barrow for the position of assistant principal." *Barrow,* 332 F.3d

at 848. Accordingly, contrary to Dr. Smith's contention and to this court's conclusion in *Barrow I,* the contours of the right that Barrow asserts in this case were clearly defined by *Brantley* and *Fyfe.* In reversing *Barrow I,* the Fifth Circuit implicitly recognized that Dr. Smith was on notice that his alleged conduct was unlawful. *See Kinney v. Weaver,* 367 F.3d 337, 367 (5th Cir. 2004) ("Qualified immunity should not be denied unless the law is such that reasonable officials should be 'on notice [that] their conduct is unlawful.'" (quoting *Saucier v. Katz,* 533 U.S. 194, 206 (2001)). Dr. Smith's due process rights were not violated on this basis.

Additionally, Dr. Smith's complaint that *Barrow* did not specifically define the appropriate level of scrutiny also fails to show a due process violation. Both *Brantley* and *Fyfe* place the burden on the state "to prove that a state action that interferes with protected educational choices of its public-school employees furthers the state's interest in the efficient operation of its schools." *Barrow,* 332 F.3d at 849. Because the Fifth Circuit concluded that *Brantley* and *Fyfe* confirmed that the right at issue was clearly established when Dr. Smith acted, it follows that these decisions sufficiently placed him on notice that it was his burden to adduce evidence that his adherence to a patronage policy advanced a state interest.

The court is therefore unable to conclude that Dr. Smith's right to due process was violated based on insufficient notice that his alleged actions would subject him to punitive damages.

Dr. Smith argues in his motions to alter or amend judgment and for judgment as a matter of law that Barrow is not entitled to punitive damages because the evidence does not support such an award. Although the way he phrases this argument appears to indicate that he is complaining that the trial evidence was insufficient to support such an award, he may in fact be asserting that the court erred by precluding him from introducing certain evidence to defend against punitive damages. This follows from the fact that his argument mirrors almost exactly the one in his motion for new trial, in which he maintains that he should have been permitted to present evidence related to the factors set out in *Kolstad v. American Dental Ass'n,* 527 U.S. 526 (1999), to counter Barrow's punitive damages claim.[10]

"[P]unitive damages may be awarded only when the defendant's conduct 'is motivated by evil intent or demonstrates reckless or callous indifference to a person's constitutional rights.'" *Williams v. Kaufman County,* 352 F.3d 994, 1015 (5th Cir. 2003) (quoting *Sockwell v. Phelps,* 20 F.3d 187, 192 (5th Cir. 1994)) (internal quotation marks omitted). The "reckless or callous indifference" this standard requires is "'recklessness in its subjective form,' i.e. 'a subjective

---

[10] Dr. Smith's argument that he was not allowed to present relevant evidence regarding punitive damages also serves as one of the bases for his motion for judgment as a matter of law.

consciousness of a risk of injury or illegality and a criminal indifference to civil obligations.'" *Id.* (quoting *Kolstad,* 527 U.S. at 536) (internal quotation marks omitted).

Dr. Smith asserts that his conduct did not include "reckless or callous indifference to the federally protected rights of others," *Smith v. Wade,* 461 U.S. 30, 56 (1983), because (1) he did not know that the alleged actions would violate any of Barrow's federally-protected rights, (2) he believed his actions were legal, and (3) the underlying theory of discrimination is novel or otherwise poorly recognized. He argues that the evidence he proffered demonstrates that it was reasonable for him to be unaware that his alleged actions would violate Barrow's rights. He also contends that he could not have been recklessly or callously indifferent to Barrow's rights if he was not subjectively aware of the federal right at issue, and that this is particularly true when other reasonable public school officials were also subjectively unaware of that right.

In his motion for new trial, Dr. Smith complains that he was not permitted to introduce testimony and exhibits that underscore the reasonableness of his position, show that his conduct was not egregious, and establish that the law was poorly recognized. He appears to contend that he should have been permitted to introduce evidence that (1) TASB maintained a sample policy imposing a public school attendance requirement on administrators and that Dr. Smith was aware of this policy, (2) this court was unaware

that the law was clearly established and held in *Barrow I* that his conduct was objectively reasonable, (3) numerous public school administrators and teachers stated that they believed a patronage policy would be legal or were uncertain as to its legal status, (4) many administrators and educators stated the existence of the TASB sample policy led them to believe that a patronage policy was legal, (5) although the alleged actions were illegal, that fact was not widely disseminated, and (6) it was reasonable for him and others to be unaware of the federal right at issue in light of the imposition of the competitive business model on the educational system in Texas in the last ten years. Dr. Smith maintains that, considering that Barrow directly attacked the reasonableness of his position, it substantially prejudiced his defense for the court to deprive him of the opportunity to present evidence to support the reasonableness of his position and that established the poor recognition that the law has received among professional educators. He contends that the presentation of this evidence would likely have resulted either in the complete elimination of the punitive damages award or in a drastic reduction of the award.

Dr. Smith's arguments are foreclosed by the Fifth Circuit's decision in *Barrow*. As already explained, the panel concluded that the right at issue in this case "was clearly established when Smith refused to consider Barrow for the position of assistant principal," and that "no reasonable official could conclude that the application of the school district's

public-school patronage policy to Barrow was constitutional." *Barrow,* 332 F.3d at 848-49. These conclusions not only foreclose the contention that Dr. Smith acted reasonably in applying the patronage policy to Barrow, they also preclude the assertion that it was reasonable for Dr. Smith or any other official not to have known that applying the policy to Barrow would violate her rights. This court could not permit Dr. Smith to introduce evidence to prove either of these contentions given the fact that the law of the case stood in stark opposition. In the court's view, if no reasonable official could conclude that the application of a patronage policy to Barrow was constitutional, there was no principled basis to allow Dr. Smith to introduce evidence that would contradict the law of the case on this point.

Moreover, Barrow argued that if Dr. Smith was permitted to introduce this evidence, she should be allowed to introduce the *Barrow* panel opinion. To the extent Dr. Smith sought to introduce evidence to show that it was reasonable for him to be unaware that the application of a patronage requirement to Barrow would have violated her rights, Barrow likely would have been entitled to impeach such evidence by introducing the panel's conclusion that "no reasonable official could conclude that the application of the school district's . . . patronage policy to Barrow was unconstitutional." *Id.* at 849. Had the court allowed Dr. Smith's evidence and the *Barrow* opinion to be introduced, the jury would have faced the confusing task of weighing the Fifth Circuit's binding legal

conclusion on the matter against factual evidence that contradicted it. To prevent jury confusion and the possibility that the jury's decision on punitive damages could be influenced by a determination on the reasonableness of Dr. Smith's conduct that differed from the Fifth Circuit's conclusion that is the law of the case, the court prevented the introduction of Dr. Smith's evidence and of the panel opinion.

Although the court precluded Dr. Smith from introducing evidence that would have related to whether his belief was objectively reasonable, it did permit him to testify regarding his own knowledge of the law and beliefs at the time, recognizing that it was necessary that Barrow show subjective recklessness to prevail on her punitive damages claim. This afforded him a fair opportunity, consistent with the constraints imposed by the law of the case, to counter her claim for punitive damages by attempting to show that he was subjectively unaware that his decision violated the law.

Dr. Smith also argues that, although the Fifth Circuit concluded that the law was clearly established, the law has not been sufficiently disseminated. While this argument is unclear, he may be reasserting his argument that he did not recklessly or callously disregard Barrow's rights because the underlying theory of discrimination is novel or otherwise poorly recognized. The Supreme Court did indicate in *Kolstad* that "[t]here will be circumstances where intentional discrimination does not give rise to punitive damages liability" under a recklessness

standard, and the Court appeared to identify as one such circumstance where "[t]he underlying theory of discrimination may be novel or otherwise poorly recognized[.]" *Kolstad,* 527 U.S. at 536-37. Dr. Smith cannot avail himself of this circumstance, however, in light of the Fifth Circuit's decision in *Barrow.* If no reasonable official could have concluded that the application of the patronage policy to Barrow was constitutional, then it cannot reasonably be said that the relevant law was novel or poorly recognized.[11] For these reasons, Dr. Smith's argument that he should have been permitted to present the evidence identified in his motions fails.

His contention that Barrow is not entitled to punitive damages because the evidence does not support such an award also lacks merit. Although Dr. Smith contends that he presented uncontroverted testimony that he did not know his alleged actions would violate Barrow's rights, he confirmed at trial what he testified to at his August 2000 deposition. He also acknowledged that, before his employment at GISD, he had a suspicion of the understanding that he should not be making employment decisions based on where someone educated her children. This is

---

[11] *Kolstad* is not a qualified immunity case, and the Court had no occasion to discuss how its conclusion regarding theories of discrimination that are novel or otherwise poorly recognized would relate to a threshold determination that the person accused of discrimination was not entitled to qualified immunity concerning the claim.

sufficient evidence to support a jury finding that he was subjectively conscious of a risk of illegality when he persisted in enforcing a patronage policy with respect to Barrow, and therefore supports the jury's assessment of punitive damages. Accordingly, Dr. Smith's arguments pertaining to the punitive damages award against him fail to show either that the award should be eliminated or reduced.

IV

The court now considers additional arguments that Dr. Smith raises in his motion for new trial.

A

Dr. Smith advances several arguments to support his more global contention that he should have been permitted to present evidence at trial related to the issue of material and substantial disruption. The court ruled in *Barrow v. Greenville Independent School District,* No. 3:00-CV-0913-D (N.D. Tex. Mar. 10, 2005) (Fitzwater, J.) ("*Barrow IV*"), that Dr. Smith could not "rely at trial on the defense that [Barrow's] exercise of her constitutional right to educate her children in private school materially and substantially impedes the operation or effectiveness of the state's educational program." Slip. op. at 1. It concluded that this was an affirmative defense that Dr. Smith was required to plead, and that allowing him to do so in his February 4, 2005 answer would unfairly surprise Barrow. *See id.* at 1, 2. Dr. Smith

contends that the court's decision prejudiced him because a ruling of material and substantial disruption would mean that his alleged conduct did not violate Barrow's constitutional rights.

Dr. Smith's argument that the affirmative defenses he pleaded in his response to Barrow's first amended complaint were sufficient to raise this defense is foreclosed by *Barrow IV*. *See id.* at 2 ("The court disagrees with the assertion of Dr. Smith's counsel during the pretrial conference that this defense is fairly found within the affirmative defenses pleaded within earlier versions of his answer."). His argument that he had the right to plead the defense in response to Barrow's third amended complaint is also foreclosed by the court's holding that allowing him to do so at this stage of the case would result in unfair surprise to Barrow. *See id.* at 1.

Moreover, the reasoning that Dr. Smith advances is inadequate to support his argument. He appears to complain that, even though the court gave Barrow permission to file a third amended complaint to seek punitive and mental anguish damages, she actually did more than that and more than doubled the size of her complaint in comparison to her first amended complaint. The mere increase in the size of Barrow's complaint, without an explanation of why the amendments warranted the assertion of an affirmative defense, does not show that he was entitled to plead the defense in response. Additionally, although Dr. Smith also points out that Barrow's third

amended complaint alleges a wide array of claims against him, including claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and Chapter 110 of the Texas Civil Practice and Remedies Code ("Chapter 110"), he fails to explain why alleging claims under these statutes gave him the right to assert an affirmative defense to a constitutional claim, and the court holds that it did not.

Finally, Dr. Smith argues that the addition of punitive damages justified pleading the defense because the issue of material and substantial disruption is related to whether his conduct was egregious, reckless, and/or callous. This argument cannot serve as the basis for a new trial.

First, to the extent Dr. Smith is complaining that he should have been able to introduce evidence of material and substantial disruption in defense of Barrow's punitive damages claim, he was not required to plead the defense in order to introduce such evidence. Although the court precluded Dr. Smith from introducing evidence of material and substantial disruption in defense of Barrow's underlying constitutional claim because he had not adequately pleaded an affirmative defense, the assertion of material and substantial disruption was not an affirmative defense to her claim for punitive damages. In *Barrow IV* the court held that the defense was an affirmative one that Dr. Smith was required to plead as to Barrow's constitutional claim because "the contention that the exercise of Barrow's constitutional right to educate

her children in private school materially and substantially impedes the operation or effectiveness of the state's educational program concerns a matter outside her prima facie case." *Id.* To recover punitive damages, Barrow was obligated to show that Dr. Smith's conduct was either "motivated by evil motive or intent" or involved "reckless or callous indifference" to her rights. *Smith,* 461 U.S. at 56. Accordingly, to the extent evidence regarding material and substantial impairment was probative of whether Dr. Smith's conduct was reckless or callous, it concerned a matter that Barrow was required to prove to make out a claim for punitive damages and did not relate to an affirmative defense. As a result, Dr. Smith did not need to plead the defense to introduce evidence pertaining to this issue to the extent it related to punitive damages.

To the extent Dr. Smith attempted at trial to introduce evidence of material and substantial disruption for a purpose other than the one that was foreclosed under the court's pretrial ruling, he did not clearly alert the court to the fact that he was attempting to do so. In *Barrow IV* the court stated that it was "not precluding a defendant from introducing evidence of [material and substantial impairment] if relevant for another purpose, *such as addressing whether Dr. Smith should be held liable for punitive damages.*" *Barrow IV,* No. 3:00-CV-0913-D, slip op. at 3 (emphasis added). Had Dr. Smith made clear that he was relying on *Barrow IV* and offering the evidence for the purpose of defending against Barrow's

punitive damages claim and not simply to preserve error concerning the pretrial ruling, the court would have considered the evidence in that context and, after considering any objections, might have admitted it. Because Dr. Smith did not clearly seek to introduce evidence of material and substantial disruption on the question of punitive damages, the court had no occasion to decide whether it was admissible for that purpose. As the court stated in *Barrow IV,* it would "decide whether the specific evidence offered is relevant and admissible, *if and when offered.*" *Id.* (emphasis added).

Second, the addition of Barrow's claim for punitive damages did not entitle Dr. Smith to plead the affirmative defense of material and substantial disruption as to Barrow's constitutional claim. Nothing about the addition of Barrow's punitive damages claim vitiated the reasons the court held in *Barrow IV* that Dr. Smith was precluded from relying on the defense at trial. Barrow would still have been unfairly surprised if Dr. Smith had been allowed to plead the defense in response to her third amended complaint.

For these reasons, Dr. Smith has failed to show that a new trial is warranted.[12]

---

[12] In his motion for judgment as a matter of law, Dr. Smith also argues that the punitive damages award should be stricken or reduced because he was not allowed to present evidence and

(Continued on following page)

B

Dr. Smith also argues that he was denied procedural due process at trial. He posits that Barrow's assertion of frivolous claims against GISD caused him hardship and a denial of due process.

First, he complains that the court required him to share the allotted 18½ hours of trial time with GISD and, as a result, he did not have sufficient time to present his case. This argument fails for two reasons. The most obvious one is that Dr. Smith and GISD completed their part of the trial *with time remaining*. Dr. Smith cannot reasonably contend that he did not have adequate time to present his case when he did not even use all of the time allotted. His argument fails for the additional reason that he did not object at trial either to having to share trial time with GISD or to the amount of time allocated. And – probably because he did not use all the time he was given – he did not request more time.

Second, Dr. Smith argues that having to share time with GISD forced the defendants into an unnatural alliance, in which Dr. Smith was pressured not to call certain witnesses for fear that GISD would take up Dr. Smith's allotted time trying to attack his witnesses' credibility. This argument fails because Dr. Smith never objected to having to share time with

---

obtain a jury issue related to the issue of material and substantial impairment. For the reasons given, this argument fails.

GISD, either before the trial started or after it began.[13]

Third, Dr. Smith complains that Barrow would not have been able to enter a letter by Cobby Caputo, Esquire ("Caputo") that was introduced at trial but for the fact GISD was a defendant, since Caputo and the law firm Schwartz & Eichelbaum were GISD's lawyers, not his. He argues that the introduction of Caputo's correspondence improperly and negatively affected his defense. Dr. Smith neither made this objection at trial nor moved for other relief, such as a separate trial. Accordingly, the court concludes that a new trial is not warranted on this basis.

C

Dr. Smith contends that he should have been permitted at trial to present evidence in support of a *Mt. Healthy*[14] defense.

"Under [*Mt. Healthy*] even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." *Texas v. Lesage*, 528 U.S. 18, 20-21 (1999)

---

[13] Dr. Smith did object to sharing peremptory strikes with GISD, which the court remedied by pretrial ruling. He did not object to sharing trial time.

[14] *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

(per curiam). Dr. Smith argues that, based on Barrow's deposition, she would not have received the position of Assistant Principal in 1998, even if she had applied and been interviewed. He explains that, during his tenure as GISD Superintendent, he instituted a procedure for selecting administrators based on preset interview questions. The interviewer would listen for certain words and phrases in an applicant's responses and award points based on how many of the specified words and phrases the applicant used. Dr. Smith acknowledges that Barrow was not interviewed and, as a result, does not have a score for 1998. Nevertheless, Barrow was asked the preset questions in her deposition in 2001, and Dr. Smith and William Smith, GISD's current Superintendent, scored her answers. The gist of Dr. Smith's arguments is that Barrow would not have qualified for the position of Assistant Principal in 1998 based on the score she received. Dr. Smith argues that it is unreasonable to think that Barrow became less capable over the three years spanning 1998 and 2001, considering that she had the questions and the correct answers before her deposition.[15] Thus he argues that even if Barrow had applied in 1998 for the position of Assistant Principal and been interviewed, she would not have been selected. He contends the exclusion of evidence pertaining to his *Mt. Healthy* defense prejudiced him, because the evidence directly contests

---

[15] Dr. Smith maintains that the preset questions and scoring card were released to Barrow during discovery.

Barrow's claim that she would have been selected for the position of Assistant Principal if she had been interviewed.

The court did not abuse its discretion in preventing Dr. Smith from introducing at trial Barrow's responses to the questions posed in her 2001 deposition. The court excluded the evidence based on its questionable relevance. That Barrow responded one way in her deposition in 2001 is not probative of whether she would have responded the same way in an interview in 1998.[16] Indeed, it is not difficult to imagine several factors that could have affected her performance during the deposition. A potentially significant one is the context in which Barrow ultimately answered the preset interview questions. Barrow's performance could have been detrimentally impacted by having to respond to the questions

---

[16] The court addressed this issue in a related context when it decided Dr. Smith's summary judgment motion in *Barrow III*, and its reasoning supports the court's decision at trial.

> The interview questions were asked of Barrow three years after the employment decision was made, and she was questioned by opposing counsel in the context of a deposition rather than by school administrators in a job interview. To conclude that the scores from Barrow's deposition testimony establish beyond peradventure that Barrow would not have been a finalist, the court would have to infer that her answers during the 2001 deposition would have been the same in a 1998 job interview, and that her answers were scored as they would have been in 1998.

Barrow III, 2005 WL 39086, at *5.

during the stress of a deposition rather than during an employment interview. Although employment interviews can be stressful, common sense teaches that there is often a significant difference between how one answers questions posed by a lawyer and those asked by a panel during an interview. Her answers could have been affected by the materially different purposes for which the questions were being asked. And, significantly, during a deposition, when a person is testifying under oath, she can be expected to choose her words carefully – to tell the whole truth and nothing but the truth – rather than to use the specific words and phrases that might increase the number of points she is awarded.

D

Dr. Smith also contends that the court erred in refusing to include instructions in the court's charge that advised the jury of the circumstances under which a patronage policy could be legal. He argues that, even if he could not attempt to avoid liability on the basis of a material and substantial disruption, the error prejudiced him regarding punitive damages, because the jury instructions created the impression that a patronage policy would always violate Barrow's rights. Although it is true that the enforcement of a patronage policy can be legal if the school district or school official shows that the school's educational mission will be materially and substantially impaired, as the court has already explained, it decided in *Barrow IV* that Dr. Smith was procedurally barred

from presenting the defense of material and substantial impairment at trial. Because there was no such evidence adduced at trial, the court did not err in refusing to instruct the jury concerning the defense of material and substantial impairment. *See, e.g., Jackson v. Taylor*, 912 F.2d 795, 798 (5th Cir. 1990) ("[I]t is error to refuse a jury instruction only if there are pleadings and sufficient evidence to support the instruction.").

V

The court now addresses Barrow's arguments in her preliminary motion for attorney's fees and in her motion to alter or amend judgment and motion for judgment as a matter of law that pertain to her entitlement to attorney's fees and/or costs.

In a memorandum opinion and order that the court filed in conjunction with the judgment in this case, it noted that the judgment provided that Barrow would bear her own taxable costs of court, subject to amending the judgment in response to a timely-filed post-judgment motion. *See Barrow v. Greenville Indep. Sch. Dist.*, No. 3:00-CV-0913, slip. op. at 1-2 (N.D. Tex. Mar. 25, 2005) (Fitzwater, J.) ("*Barrow V*"). The court explained that, although Barrow had prevailed against Dr. Smith and would normally recover her taxable costs of court as a matter of course, Dr. Smith had made Rule 68 offers of judgment that might result in denying Barrow some of these costs. *Id.* After the court accepted the verdict,

and after considering counsels' positions concerning the most efficient manner in which to proceed, it directed Barrow to file only a summary motion for attorney's fees, excluding the amount of fees sought or supporting documentation, until the court had the opportunity to review Dr. Smith's offers of judgment. Timely post-trial motions have been filed, and the court now addresses the arguments that pertain to the award to Barrow of attorney's fees and court costs.

A

Barrow argues in her motion to alter or amend judgment and motion for judgment as a matter of law that the court erred in refusing to grant her costs against Dr. Smith. She contends that a presumption exists that a prevailing party is entitled to recover her costs, and that no law supports the position that a prevailing civil rights plaintiff can be denied her costs because a defendant allegedly made a Rule 68 offer of judgment. Although under Rule 54 a prevailing party is presumptively entitled to recover her costs, *see Wilson,* 160 F.3d at 212, "Rule 68 . . . removes the presumption in favor of the prevailing party, and provides for the assessment of costs against a prevailing plaintiff who obtains a judgment less favorable than the offer of judgment made by defendant." *Pub. Interest Research Group, Inc. v. Struthers-Dunn, Inc.,* 1988 WL 147639, at *2 (D.N.J. Aug. 16, 1988). Rule 68 explicitly provides that, "[i]f the judgment finally obtained by the offeree is not

more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Rule 68. Therefore, the question whether Barrow is entitled to costs will depend on whether Dr. Smith made valid offers of judgment under Rule 68 and whether the judgment Barrow finally obtained is more favorable than Dr. Smith's offers. It must be kept in mind that "the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority." *Marek v. Chesny,* 473 U.S. 1, 9 (1985). Because Barrow pursued her constitutional claims under § 1983, as a prevailing plaintiff, Barrow would be entitled to recover reasonable attorney's fees as part of her costs pursuant to 42 U.S.C. § 1988. *See id.*; 42 U.S.C. § 1988. Thus in the instant case, the "costs" mentioned in Rule 68 encompass not only Barrow's taxable court costs, but also her reasonably-incurred attorney's fees. *See Marek,* 473 U.S. at 9.

In her preliminary motion for attorney's fees, Barrow argues that Dr. Smith's offers of judgment[17]

---

[17] Dr. Smith was involved in three different offers of judgment. The first was made jointly by Dr. Smith and GISD on August 23, 2000 for $30,000. This amount specifically encompassed "any and all items of damage, other than attorney's fees, which are to be awarded separately by the Court." Ds. Aug. 23, 2000 Offer of Judgment at 1. The second was made solely by Dr. Smith on January 18, 2001 for $100,000, which encompassed "any and all items of damage and recovery sought by Plaintiff, including attorney's fees." Dr. Smith Jan. 18, 2001 Offer of Judgment at 1. The third was again made jointly with GISD on September 8, 2004 for $154,666.00, which encompassed "any

(Continued on following page)

have no impact on her entitlement to attorney's fees and related litigation costs.[18] She advances virtually the same arguments in her briefs in support of her motion to alter or amend judgment and motion for judgment as a matter of law in support of the contention that the court erred in refusing to grant her costs against Dr. Smith. Some of Barrow's arguments challenge the validity of the offers of judgment Dr. Smith made, while others appear to be directed to showing that the judgment she ultimately received is more favorable than Dr. Smith's offers. The court will address her arguments in turn.

B

The court addresses first Barrow's challenges to the validity of Dr. Smith's offers of judgment.

---

and all items of damage and recovery sought by Plaintiff, including attorney's fees." Ds. Sept. 8, 2004 Offer of Judgment at 1.

Although she specifically addresses most of her arguments in her preliminary motion for attorney's fees to defendants' August 2000 offer of judgment, she also posits at one point that Dr. Smith's January 2001 offer suffers from the same defects. Unless the context indicates otherwise, the court will address Barrow's arguments as if they were specifically directed to both the August 2000 and January 2001 offers of judgment.

[18] Although Barrow advances several arguments in support of her contention that Dr. Smith's offers of judgment have no impact on her entitlement to attorney's fees and costs, she does not cite any supporting authority.

Barrow appears to argue that Dr. Smith's failure to admit liability and agree to equitable relief invalidates his offers. She avers that he did not offer to resolve the unlawful employment condition that he imposed, a promotion, injunctive prohibition on his future unlawful edicts, or a GISD policy prohibiting use of a patronage policy when making employment decisions. Barrow also complains that the offers lacked an admission of liability and an agreement to enter a declaratory judgment declaring use of the patronage policy that violated the law.

Barrow's argument that Dr. Smith's offers are invalid because he did not admit liability lacks merit. The court agrees with other courts that hold that "Rule 68 does not require that offers of judgment include[] admissions of liability." *Jolly v. Coughlin,* 1999 WL 20895, at *8 (S.D.N.Y. Jan. 19, 1999); *see also Staples v. Wickesberg,* 122 F.R.D. 541, 544 (E.D. Wis. 1988) (considering the same argument raised here and rejecting it as being "utterly without merit"); *Mite v. Falstaff Brewing Corp.,* 106 F.R.D. 434, 435 (N.D. Ill. 1985) (denying plaintiff's objections to Rule 68 offer of judgment that explicitly disclaimed admission of liability, finding that offer was technically sufficient). As one court has observed, disclaiming liability in Rule 68 offers of judgment appears to be commonplace. *Aynes v. Space Guard Prods., Inc.,* 201 F.R.D. 445, 450 (S.D. Ind. 2001) (citing cases); *see, e.g., Delta Air Lines, Inc. v. August,* 450 U.S. 346, 349 n.2 (1981) (noting offer of judgment

that contained disclaimer of liability); *MRO Communs., Inc. v. AT&T Co.*, 197 F.3d 1276, 1279 (9th Cir. 1999) (same); *Chathas v. Local 134 Int'l Bhd. of Elec. Workers*, 233 F.3d 508, 511 (7th Cir. 2000) (noting that "[t]he essence of the offer was that the preliminary injunction would be made permanent, but that the offer was not to be construed as an admission of liability."); *Colondres v. Scoppetta*, 290 F. Supp. 2d 376, 384 (E.D.N.Y. 2003) (noting that "[d]efendants' Rule 68 offer specifically stated that it was not to be construed as an admission of liability."). Rule 68 itself does not explicitly prevent this practice. Moreover, "[t]he policy behind Rule 68 is to 'encourage settlement and avoid litigation.'" *Jason D. W. by Douglas v. Houston Indep. Sch. Dist.*, 158 F.3d 205, 212 (5th Cir. 1998) (quoting *Marek*, 473 U.S. at 5). "[R]equiring a clear admission of liability in every offer of judgment would . . . reduce the effectiveness of Rule 68 as a tool to encourage the settlement of all lawsuits." *Jolly*, 1999 WL 20895, at *8. Accordingly, Dr. Smith's offers of judgment are not rendered invalid because they do not contain an admission of liability. Nor are Dr. Smith's offers invalid because they failed to provide for the equitable or declaratory relief Barrow listed or to manifest his assent to issuance of a declaratory judgment. Barrow's first amended complaint, which was her operative complaint at the time Dr. Smith made his contested offers of judgment, did pray for monetary damages as well as injunctive and declaratory relief. Nevertheless, Dr. Smith was not obligated to offer each type of relief in his Rule 68 offers. Rule 68 appears to allow a party who makes an offer to

specify what he is willing to give up in exchange for allowing a judgment to be entered against him. *See* Rule 68 ("[A] party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property *or to the effect specified in the offer*[.]" (emphasis added)). The court in *Leach v. Northern Telecom, Inc.*, 141 F.R.D. 420 (E.D.N.C. 1991), rejected an argument similar to Barrow's in deciding the plaintiff's motion to strike the defendant's offer of judgment. *Id.* at 428. The plaintiff argued that the offer was insufficient because it did not include the equitable relief she sought in her complaint. *Id.* The court held that "[n]othing in Rule 68 requires equitable relief to be included as part [of] an offer of judgment when the complaint seeks both equitable and monetary relief." *Id.; see also* 13 *Moore's Federal Practice* § 68.04[5], at 68-28 (3d ed. 2005) (quoting *Leach* and observing that "[a]n offer responding to a complaint seeking both damages and injunctive relief need not specify some element of both."); *but see Whitcher v. Town of Matthews*, 136 F.R.D. 582, 585 (W.D.N.C. 1991) (concluding that "offers including only monetary damages but excluding equitable or injunctive relief would . . . be inconsistent with [Rule 68]" and observing that "had [d]efendant made Offers of Judgment excluding the portion of the complaint addressing injunctive relief, the offer would have been ineffective[.]"). *Leach*'s holding is sound. As one recognized treatise explains, "[i]f a defendant may offer less than all the compensatory damages sought . . . there is no reason why it

may not offer only one form of relief when a complaint seeks both injunctive and damage remedies." 13 *Moore's Federal Practice* § 68.04[5], at 68-28 (3d ed. 2005).

2

Barrow also argues that Dr. Smith's offers of judgment imposed conditions that Rule 68 does not permit. Specifically, she maintains that the offers were conditioned on her willingness to enter into a settlement and release of all claims made the basis of her suit. *See* Ds. Aug. 23, 2000 Offer of Judgment at 1 ("This offer of judgment is made in exchange for a settlement and release of all claims by [Barrow] against Defendants . . . arising from Plaintiff's alleged injuries made the basis of this litigation."); Dr. Smith Jan. 18, 2001 Offer of Judgment at 1 (providing similarly). She argues that Rule 68 is not an alternative method for making settlement offers, but provides for "an offer to allow judgment to be taken against the defending party[.]" Rule 68. Barrow contends that Dr. Smith's offers are settlement offers, not Rule 68 offers to allow a judgment to be taken against the defending party, because he never said that he would allow a judgment to be taken against him. Barrow's argument implies that a Rule 68 offer cannot also be a settlement offer. This implication is incorrect. Even though an offer made under Rule 68 is termed an "offer of judgment," this does not negate the fact that an offer made under this Rule is a settlement offer in that it proposes terms upon which

the controversy between the parties will be resolved. Several courts, including the Supreme Court, have suggested that offers made under Rule 68 are, in fact, settlement offers. *See, e.g., Delta Air Lines,* 450 U.S. at 350 ("Rule 68 prescribes certain consequences for *formal settlement offers* made by 'a party defending against a claim.'" (emphasis added)); *id.* at 363 (Powell, J., concurring) ("A Rule 68 offer of judgment is a *proposal of settlement. . . .*" (emphasis added)); *First Nat'l Bank v. FDIC, 196* F.3d 1186, 1189 (10th Cir. 1999) ("'Rule 68 permits a party defending against a claim to recover all costs incurred after the making of an offer of judgment if the offeree rejected the *settlement offer* and ultimately was awarded less at trial.'" (quoting *Am. Ins. Co. v. El Paso Pipe & Supply Co.,* 978 F.2d 1185, 1193 (10th Cir. 1992) (emphasis added)); *Ortiz v. Regan,* 980 F.2d 138, 141 (2d Cir. 1992) ("Rule 68 permits a party defending against a claim to make a *settlement offer* and thereby avoid any liability for costs, including attorney's fees, incurred after the making of the offer." (emphasis added)); *Guerrero v. Cummings,* 70 F.3d 1111, 1113 (9th Cir. 1995) (referring to offer made under Rule 68 as "Rule 68 settlement offer"); *Bynum v. Equitable Mortgage Group,* 2005 WL 818619, at *5 (D.D.C. Apr. 7, 2005) ("[A]n accepted Rule 68 offer of judgment constitutes a settlement between the parties making and accepting the offer.").

The terminology Dr. Smith used in his offers, in which he conditioned them on the release of Barrow's claims, is not prohibited by Rule 68. Including such

language simply makes explicit what the operation of the Rule already provides on its own. "Under Rule 68 . . . a party may compromise a claim by offering a settlement to be entered against it in a form of a final judgment. By operation of the rule, if the offer is accepted, all claims are settled and the case is concluded." *Williams v. J.C. Penney Co.*, 1991 WL 150617, at *1 (S.D.N.Y. Jul. 30, 1991). If Barrow had accepted one of Dr. Smith's offers of judgment, with or without the contested language, her claims against him would have been settled via the resulting judgment.

Finally, that Dr. Smith did not explicitly state that he was allowing a judgment to be taken against him does not render his offers ineffective under Rule 68. The language of Dr. Smith's offers clearly indicates that he was making them under Rule 68. *See* Ds. Aug. 23, 2000 Offer of Judgment at 1 ("Defendants . . . present their Offer of Judgment pursuant to Rule 68[.]"); Dr. Smith Jan. 18, 2001 Offer of Judgment at 1 ("Defendant offers Judgment in the amount of $100,000.00 . . . as provided for by Rule 68."). Accordingly, it was sufficiently clear from the offers that Dr. Smith made that he was offering to allow a judgment to be entered against him according to the operation of the Rule. For the foregoing reasons, Barrow has failed to show that Dr. Smith's offers of judgment are not valid under Rule 68.

C

The court now considers whether the judgment Barrow finally obtained is more favorable than Dr. Smith's offers of judgment. Barrow appears to rely on both monetary and non-monetary factors in attempting to show that the judgment she obtained is more favorable than the offers. The court addresses monetary factors here and non-monetary factors below.

1

The court first considers whether the judgment Barrow obtained is more favorable than defendants' August 2000 offer of judgment for $30,000.

Barrow points out that the court awarded her judgment for $15,455.00 plus prejudgment interest, which she calculates to be $2,967.44. The judgment also awarded her $20,000 in punitive damages. Adding these sums together, Barrow obtained a judgment in the amount of $38,422.44. In an argument apparently directed specifically to defendants' August 2000 offer, Barrow maintains that this amount is more favorable, by at least 28%, than the offer defendants made.

Defendants' offer provides that "[d]efendants offer Judgment in the amount of $30,000.00. . . . This lump-sum amount encompasses any and all items of damage, other than attorney's fees, which are to be awarded separately by the Court." Ds. Aug. 23, 2000 Offer of Judgment at 1. In *Marek* the Supreme Court

explained that Rule 68 does not require defendants to "itemize the respective amounts being tendered for settlement of the underlying substantive claim and for costs." *Marek*, 473 U.S. at 6. It did state, however, that the offer must "be one that allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued." *Id.* (emphasis omitted). Because "costs" in the instant case include not only taxable costs but also attorney's fees, defendants' offer must have allowed judgment to be taken as to both. Since defendants' offer explicitly provided for the assessment of attorney's fees, Barrow's apparent intimation that defendants did not agree to pay attorney's fees in their offer is incorrect. Defendant's offer, however, does not mention court costs. This fact does not render defendants' offer invalid. The Supreme Court explained in *Marek* that

> it is immaterial whether the offer recites that costs are included, whether it specifies the amount the defendant is allowing for costs, or, for that matter, whether it refers to costs at all. As long as the offer does not implicitly or explicitly provide that the judgment *not* include costs, a timely offer will be valid.

Id. Defendants' offer neither explicitly nor implicitly precludes a judgment for costs.

A separate, yet relevant, inquiry is whether court costs are included in the $30,000 sum that defendants

offered. The offer explicitly excludes attorney's fees from this amount but is silent as to court costs. If the court concludes that the sum of $30,000 does not include court costs, the court will award them separately. *See id.* ("[I]f the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount which in its discretion it determines to be sufficient to cover the costs." (citation omitted)). It is evident from Barrow's briefing that she is unsure whether defendants' offer includes court costs. In her reply brief supporting her motion to alter or amend judgment and motion for judgment as a matter of law, she avers at one point that defendants' offer is unclear as to court costs. At another point in the same brief she posits that it did not include court costs. In her preliminary motion for attorney's fees, however, Barrow contends that defendants' offer did include her court costs. The court need not clear up this confusion because, as it will explain, the judgment that Barrow ultimately obtained is more favorable than defendants' offer, regardless whether the $30,000 offer includes court costs.

In her motion to alter or amend judgment and motion for judgment as a matter of law, Barrow argues that, in order to determine if she obtained a judgment more favorable than defendants' offer, her costs must be determined because they are part of the

judgment.[19] Her preliminary motion for attorney's fees suggests that her argument is premised on the inclusion of court costs in defendants' $30,000 offer. There Barrow argues that "because the amount offered by [defendants'] included cost[s] of court in the 'lump-sum', the comparison required by Rule 68 requires that the district court include in the judgment obtained . . . Plaintiff's costs of court." P. Prelim. Mot. for Atty's Fees at 8.

The court has located no Fifth Circuit case that has specifically addressed whether pre-offer attorney's fees and/or costs should be considered as part of the "judgment finally obtained" for conducting the comparison called for by Rule 68. Other circuits that have considered the issue appear to conclude, however, that, if the offer of judgment includes costs and attorney's fees, the fees and costs accrued at the time of the offer should be added to the amount of the judgment for purposes of the Rule 68 comparison. *See, e.g., Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1020 (9th Cir. 2003) ("Where a

---

[19] The court does not construe this argument as advancing the position that court costs incurred after the offer of judgment was made should be considered in addition to pre-offer costs in determining the value of the judgment finally obtained. In any case, such an argument is foreclosed by the Supreme Court's decision in *Marek*. In *Marek* the Court recognized that post-offer costs should not be considered in determining whether the judgment finally obtained is more favorable than an offer of judgment. *See Marek*, 473 U.S. at 7; *see also Marryshow v. Flynn*, 986 F.2d 689, 692 (4th Cir. 1993).

Rule 68 offer explicitly states that it is inclusive of prejudgment interest and pre-offer costs and attorneys' fees, the judgment to which the offer is compared must include these items if they are awarded."); *Tunison v. Continental Airlines Corp.*, 162 F.3d 1187, 1192 (D.C. Cir. 1998) ("[S]ince the offer includes pre-offer costs, the amount of judgment used for comparison must include pre-offer costs as well, if they are to be awarded."); *Scheeler v. Crane Co.*, 21 F.3d 791, 792-93 (8th Cir. 1994) (noting that offer of judgment was "for a full settlement of plaintiff's claims, including costs and attorney fees accrued" and finding that "[i]f the plaintiff's payment of her own attorney fees was part of the Rule 68 offer, it is surely equitable that attorney fees be included as part of the recovery. This is the only way in which the offer can be fairly matched against the recovery."); *Marryshow v. Flynn*, 986 F.2d 689, 692 (4th Cir. 1993) ("Because the offer includes costs then accrued, to determine whether the judgment obtained is 'more favorable,' . . . the judgment must be defined on the same basis – verdict plus costs incurred as of the time of the offer of judgment."); *see also Grosvenor v. Brienen*, 801 F.2d 944, 945, 948 (7th Cir. 1986) (holding that "pre-offer attorney's fees must be added to the judgment award for the purposes of determining whether the result obtained by a plaintiff is more favorable than the offer of judgment he rejected" in case where court observed that defendant's $5,000 offer of judgment "included costs and attorney's fees accrued up to the date of the offer."). In considering pre-offer costs or attorney's fees as part of the judgment finally

obtained, the courts in *Marryshow* and *Scheeler* were clearly motivated by an interest in achieving an accurate and equitable comparison of the offers of judgment to the judgment the plaintiff ultimately received. *Marryshow* explained that

> [i]t is neither logical nor consistent with the rule and applicable authority to compare an offer of judgment which includes all costs, including attorney's fees, and a judgment finally obtained which includes no costs. To make a proper comparison between the offer of judgment and the judgment obtained when determining, for Rule 68 purposes, which is the more favorable, like "judgments" must be evaluated.

Marryshow, 986 F.2d at 692; *see also Scheeler,* 21 F.3d at 793.

Assuming *arguendo* that defendants' $30,000 offer did not include court costs, the total value of the offer would actually be $30,000 plus Barrow's pre-offer attorney's fees and costs, because the court would award these items separately. In accord with the cases cited above, in conducting the analysis called for by Rule 68, the court must compare this amount with the value of the judgment Barrow obtained – $38,422.44 – plus her pre-offer attorney's fees and costs. *See Tunison,* 162 F.3d at 1192 (holding that where plaintiff obtained damage award of $0 and defendant's offer of judgment for $1,000 did not include costs, even if plaintiff was entitled to costs, "the appropriate comparison under Rule 68 would

[be] between $1,000 plus pre-offer costs and $0 plus pre-offer costs."). This ensures that like "judgments" are compared, as the court in *Marryshow* counseled. Because Barrow's pre-offer attorney's fees and costs will represent the same figure on both sides of the Rule 68 equation, the court may disregard them for purposes of the comparison. This explains why pre-offer attorney's fees and costs need only be considered when the offer made actually includes these items. Because the judgment Barrow obtained worth $38,422.44 is more favorable than defendant's offer of $30,000, her ability to recover her post-offer costs and attorney's fees is not affected by defendants' offer.

On the other hand, if defendants' $30,000 offer *did* include court costs, to determine whether the judgment she obtained is more favorable than defendants' offer, the court must ascertain the amount of recoverable court costs Barrow had incurred by the time of defendants' offer and add that amount to the $38,422.44 judgment. The court need not consider her pre-offer attorney's fees because, as explained above, they would be considered on both sides of the Rule 68 equation. Accordingly, the "judgment finally obtained" by Barrow under this scenario would be $38,422.44 plus her pre-offer court costs. This is certainly more favorable than $30,000. Thus even if defendants' $30,000 offer included court costs, the judgment Barrow obtained is more favorable and defendants' offer would not affect her recovery of post-offer costs and attorney's fees.

The court next considers whether Dr. Smith's individual offer of $100,000 in January 2001 is more favorable than the judgment Barrow obtained. The court again restricts its analysis to monetary considerations.

Dr. Smith's offer is patently more favorable than the relief awarded in the judgment. Nevertheless, Barrow maintains that Dr. Smith's offer did not come close to compensating her for her monetary damages, costs of court, and accrued attorney's fees incurred to the date of the offer, much less the equitable relief sought. Construing Barrow's argument somewhat generously, she may be suggesting that, for purposes of determining whether Dr. Smith's offer is less favorable than the judgment she obtained, the court must consider as part of the judgment both her attorney's fees and the court costs she incurred before his offer.

The court must first address whether Dr. Smith's $100,000 offer included court costs and attorney's fees. The offer provides, in relevant part, that "[t]his lump-sum amount encompasses any and all items of damage and recovery sought by Plaintiff, including attorney's fees." Dr. Smith Jan. 18, 2001 Offer of Judgment at 1. It is clear from this language that the sum of $100,000 includes attorney's fees. But as was the case with defendants' August 2000 offer, Dr. Smith's offer does not explicitly provide whether it includes court costs. As distinguished from defendants'

$30,000 offer, the question whether the judgment Barrow obtained is more favorable than Dr. Smith's offer may depend significantly on whether the offer includes court costs.

"Courts apply general contract principles to interpret Rule 68 offers of judgment." *Basha v. Mitsubishi Motor Credit of Am., Inc.*, 336 F.3d 451, 453 (5th Cir. 2003) (citing *Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991), and *Radecki v. Amoco Oil Co.*, 858 F.2d 397, 400 (8th Cir. 1988)). In *Basha* the Fifth Circuit determined that the district court did not commit clear error in concluding that the offer of judgment included attorney's fees where "the circumstances surrounding the offer, if not the text itself, strongly support[ed] the view that the parties intended to settle all claims, including those for attorney's fees," even though the offer did not address attorney's fees explicitly. *Id.* at 453-54. The court considered extrinsic evidence in reaching its conclusion. It noted that defendants' counsel sent plaintiff's lawyer a letter one week before the offer's acceptance that stated "that the defendants agreed to 'pay an additional $2,000 in exchange for a full settlement of this matter with prejudice against these entities and a defense and indemnification as to any remaining parties to this lawsuit.'" *Id.* at 454. The court also observed that defendants' lawyer informed plaintiff by letter several days after the offer's acceptance "that the offer of judgment would 'conclude this case as to our clients.'" *Id.* The court concluded that "[t]hese two letters, and [plaintiff's] active role in

preparing the offer, show that [defendants'] offer was a reflection of the parties' efforts to secure a settlement and dismissal of the entire claim." *Id.*

Basha supports the conclusion that an offer of judgment can include costs or attorney's fees even if it does not mention them explicitly. Such a conclusion is also supported by the Seventh Circuit's decision in *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390 (7th Cir. 1999). In *Nordby* the court held that an offer of judgment that provided for "judgment in the amount of $56,003.00 plus $1,000 in costs as one total sum as to all counts of the amended complaint" unambiguously included attorney's fees, even though they were not mentioned. *Id.* at 391-92. It observed that the language "[o]ne total sum as to all counts of the amended complaint" could "only mean one amount encompassing all the relief sought in the counts," and it recognized that "[o]ne of those counts specified attorneys' fees as part of the relief sought." *Id.* at 392.

This court similarly concludes that Dr. Smith's offer unambiguously included court costs, even though they were not specifically mentioned in his offer. As stated earlier, the offer provides that the $100,000 offered "encompasses any and all items of damage and recovery sought by Plaintiff, including attorney's fees." Just as the court in *Nordby* concluded that the language of the offer in that case could "only mean one amount encompassing all the relief sought in the counts," this language can only mean one amount encompassing all items of damage

and recovery that Barrow sought. Barrow clearly indicated in her first amended complaint – her operative complaint at the time Dr. Smith made his offer – that she sought to recover "all court costs and expenses incurred to bring this action." P. First Am. Compl. ¶ 5.5. Accordingly, the court concludes that Dr. Smith's $100,000 offer includes both court costs and attorney's fees. Because it does, for purposes of conducting the comparison called for by Rule 68, the court must compare Dr. Smith's offer to the value of the judgment Barrow obtained ($38,422.44), plus the value of the sum of Barrow's pre-offer court costs and attorney's fees, to ensure the comparison of like "judgments."

To ensure that the policy objectives of 42 U.S.C. § 1988 are upheld, it is especially important to compare like "judgments" when a court is performing the Rule 68 comparison in a case brought under § 1983. This requires that pre-offer attorney's fees be considered in the Rule 68 comparison. *See Grosvenor,* 801 F.2d at 946-48 (discussing reasoning for including such fees in comparison of offer and judgment obtained). Excluding pre-offer attorney's fees and costs from the Rule 68 analysis would "strip [civil rights] plaintiffs of the benefits of § 1988, and would disregard the value to society of the effective enforcement of civil rights." *Id.* at 948. Accordingly, reasonably-incurred pre-offer costs and attorney's fees should be included as part of the judgment that Barrow finally obtained for purposes of determining whether the judgment is more favorable than Dr. Smith's offer.

Because Barrow's reasonably-incurred pre-offer costs and attorney's fees will be considered, the court is unable to determine at this time whether the "judgment finally obtained" is more favorable than Dr. Smith's offer. Because she was not required to do so, Barrow has not yet filed a fee application that enables the court to determine the value of her reasonable pre-offer costs and attorney's fees. Accordingly, Barrow must file a complete attorney's fee application within 20 days of the date this memorandum opinion and order is filed, delineating those fees and costs incurred before Dr. Smith's January 18, 2001 offer of judgment from those incurred afterward and delineating those fees and costs incurred before Dr. Smith's and GISD's September 8, 2004 offer of judgment from those incurred afterward.[20] To reduce

---

[20] Mirroring the language in Dr. Smith's offer, defendants' September 8, 2004 offer in the amount of $154,666.00 states that the "lump-sum amount encompasses any and all items of damage and recovery sought by Plaintiff, including attorney's fees." Ds. Sept. 8, 2004 Offer of Judgment at 1. Because both Barrow's second amended complaint (the operative complaint as to GISD at the time of the offer) and her first amended complaint (the operative complaint as to Dr. Smith at the time of the offer) stated that Barrow was seeking to recover court costs, the court concludes, for reasons stated above, that the $154,666.00 amount specified in the offer included Barrow's pre-offer costs and attorney's fees. This conclusion is also supported by a form defendants attached to their offer entitled, "Acceptance by Plaintiff," which was apparently intended for Barrow's use to indicate her acceptance of defendants' offer. This form includes a sentence that provides, "I acknowledge that this lump-sum amount includes compensation for all damages, costs and attorney's fees." *Id.* at 4. This unequivocally manifests defendants'

(Continued on following page)

expenses and filing burdens, she may adopt and/or supplement materials already on file with the clerk provided (1) she clearly identifies by title and file date the materials adopted and/or supplemented (2) clearly identifies the materials already on file and the new materials she is filing that she asks the court to review, and (3) clearly identifies (at least in her brief) the attorney's fees and costs that pre-date January 18, 2001 and September 8, 2004. In her brief, she must also cite materials already on file in the manner required by N.D. Tex. R. 7.2(e). The application (both as to any materials already on file and as to those filed in response to today's decision) must meet the usual standards that govern such fee applications and must allow the court to determine, not only what fees and costs were incurred, but when they were incurred. Dr. Smith may file his response and brief within 20 days of the date the application is filed. He may also adopt materials already on file, provided he complies with the identification and briefing requirements specified for Barrow. Barrow may file a reply brief, but not new evidence, within 15 days after Dr. Smith's response and brief are filed. The court will consider the amount of Barrow's attorney's fee award after considering these materials and applying Rule 68 to the decisional process.

---

intent to include costs in the $154,666.00 sum specified. Accordingly, the nature of the comparison called for under Rule 68 will be the same as for Dr. Smith's January 2001 offer. If necessary, the court will conduct the appropriate Rule 68 analysis as to this offer once it has reviewed Barrow's fee application.

D

Now that the court has addressed monetary considerations pertinent to the comparison called for under Rule 68, it will turn to any non-monetary considerations that Barrow advances.

Barrow appears to argue that defendants' August 2000 offer of judgment was also less favorable than the judgment obtained because it failed to provide for equitable relief. Specifically, she avers that it did not offer to promote her, to restrict Dr. Smith's future unlawful conduct, or to remove Dr. Smith from the decisionmaking process for Barrow's future promotion applications or provide other equitable relief that she sought. She posits that in August 2000 Dr. Smith was still the GISD Superintendent and that GISD still had delegated to Dr. Smith the final authority to make interview and promotion recommendations. She also maintains that, at that time, Dr. Smith had never retracted his statement of July 30, 1998 to Barrow and her husband that she had "no future" as an administrator with GISD as long as her children attended the Greenville Christian School. Barrow also appears to indicate that the Fifth Circuit's decision in *Barrow,* which she maintains is incorporated into the judgment via the court's charge, also shows that the judgment is more favorable than Dr. Smith's January 2001 offer.

The court declines to accept Barrow's apparent reliance on the failure of these offers to provide for equitable relief to show that the judgment is more

favorable than the offers. The language of Rule 68 identifies the "judgment finally obtained" as the standard against which the court must compare the offer of judgment. *See* Rule 68 ("If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after making the offer."); *Johnston v. Penrod Drilling Co.*, 803 F.2d 867, 870 (5th Cir. 1986); *see also Spencer v. Gen. Elec. Co.*, 894 F.2d 651, 664 (4th Cir. 1990) ("[T]he unambiguous language of Rule 68 must be given its plain meaning and accordingly, in making the comparison required by the Rule, a trial court should consider only the terms of the 'judgment finally obtained' by the offeree, and nothing more."), *abrogated on other grounds by Farrar v. Hobby*, 506 U.S. 103 (1992). The judgment in the instant suit did not award equitable relief. Thus it is no more favorable in this respect than are defendants' or Dr. Smith's offers of judgment.

Additionally, it appears that Barrow has directed the court to conditions that existed at the time of defendants' August 2000 offer to show that this litigation has remedied adverse conditions that defendants did not offer to correct. Even if the litigation has yielded positive results not addressed either in defendants' or Dr. Smith's offers of judgment, these results are not part of the judgment Barrow obtained. *See Spencer*, 894 F.2d at 663 (holding that district court erred in including non-judgment relief as part of judgment plaintiff finally obtained in determining whether judgment was more favorable than offer of

judgment); *Jolly,* 1999 WL 20895, at *9 (observing that "Rule 68 makes no provision for the comparison of those aspects of the case that are not reflected in the judgment" and noting that the comparison should not be "between the offer and any other relief [besides the judgment obtained] that may have resulted from the litigation process."). Consequently, the court will not consider them in determining the legal effect of Dr. Smith's offers of judgment. The court likewise will not take into account the Fifth Circuit's decision in *Barrow* in determining whether the judgment obtained is more favorable than Dr. Smith's offer. The decision in *Barrow* was not incorporated into the judgment via the court's charge, as Barrow contends, and is therefore not part of the "judgment finally obtained."

VI

Dr. Smith requests that the court award him reasonable attorney's fees against Barrow and her counsel under § 1988. The court declines this request.

A

"Prevailing defendants are entitled to attorneys' fees under . . . section 1988 only upon a showing that the plaintiff's action was frivolous, unreasonable, groundless, or made in bad faith, or that the plaintiff continued to litigate after it clearly became so." *Trevino v. Holly Sugar Corp.,* 811 F.2d 896, 906 (5th Cir. 1987). Dr. Smith asserts three different reasons

for why he is entitled to attorney's fees. First, he contends that Barrow voluntarily dismissed claims against him under Title VII, Chapter 110, Article I, § 6 of the Texas Constitution ("Article I, § 6"), and the claims against him in his official capacity, to avoid an unfavorable judgment on the merits. He argues that each claim was frivolous, groundless, or without merit. Second, he contends that Barrow's free exercise claim, while not dismissed voluntarily, was frivolous, groundless, or without merit. Third, he posits that Barrow's pursuit of her parental rights claim became frivolous after she rejected offers of judgment that would have made her whole.

B

Barrow contends that she prevailed on her primary claim concerning her constitutional right to exercise her choice to provide a private religious education for her children without employment discrimination by Dr. Smith. She urges that all of her causes of action were interrelated with her constitutional claims pertaining to her parental rights, and that Dr. Smith did not prevail on any distinct claims that were not related to her central contentions surrounding her legal rights as a parent. She argues that only claims that are based on different facts and legal theories can be considered unrelated to each other so as to allow a defendant to recover attorney's fees when a plaintiff succeeds in the litigation.

"Only a 'prevailing party' in a civil rights action is eligible for an award of attorney's fees under section 1988." *Associated Builders & Contractors, Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 377 (5th Cir. 1990). "To qualify as a prevailing party, the plaintiff must (1) obtain actual relief, such as an enforceable judgment or a consent decree; (2) that materially alters the legal relationship between the parties; and (3) modifies the defendant's behavior in a way that directly benefits the plaintiff at the time of the judgment or settlement." *Walker v. City of Mesquite*, 313 F.3d 246, 249 (5th Cir. 2002) (citing *Farrar*, 506 U.S. at 111-12). Based on this definition, there can be no doubt that Barrow is a prevailing party in this case in relation to Dr. Smith. She prevailed on her parental rights claim and obtained a judgment for compensatory and punitive damages.

Despite this, Dr. Smith may still be entitled to recover attorney's fees if he can show not only that Barrow failed on claims that were unrelated to her parental rights claim but that these unrelated claims were frivolous. *See Hensley v. Eckerhart*, 461 U.S. 434, 435 & n.10 (1983); *Uviedo v. Steves Sash & Door Co.*, 753 F.2d 369, 370-71 (5th Cir. 1985). In *Uviedo* the Fifth Circuit explained that

> a plaintiff's claims which are unrelated to each other, though formally and properly joined in a single suit against a single defendant, are nevertheless to be considered for attorneys' fees purposes as if each were brought in a separate suit, so that a party's

> success or failure on one claim is not to be considered in determining that party's entitlement (or vulnerability) to attorneys' fees on an unrelated claim.

Uviedo, 753 F.2d at 370-71. The court explicitly noted *Hensley*'s language that "[t]he congressional intent to limit [attorneys' fees] awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim," and that "[i]f the unsuccessful claim is frivolous, the defendant may recover attorney's fees incurred in responding to it[.]" *Id.* at 371 (quoting *Hensley,* 461 U.S. at 435 & n.10) (alteration in original). Although the Court in *Hensley* recognized "that there is no certain method of determining when claims are 'related' or 'unrelated,'" *Hensley,* 461 U.S. at 437 n.12, it did appear to suggest that those claims "based on different facts and legal theories" would be considered "unrelated," while those that "involve a common core of facts" or are "based on related legal theories" are "related," *id.* at 434-35.

The court concludes that all of Barrow's claims were sufficiently related to her parental rights claim as to prevent Dr. Smith from recovering attorney's fees under § 1988 as a prevailing party. Each claim depended on the same set of factual circumstances: Dr. Smith's refusal to consider her for the position of Assistant Principal because she would not enroll her children in public school. Because Barrow's claims

were all sufficiently related, the court need not decide whether they were frivolous.

C

Dr. Smith also argues that he is entitled to attorney's fees because Barrow's parental rights claim became frivolous after she rejected his and GISD's offers of judgment. The court disagrees. Dr. Smith is not entitled to attorney's fees with respect to Barrow's parental rights claim because, as the court has explained, Barrow, not Dr. Smith, prevailed on this claim. *See Albright v. Good Shepherd Hosp.*, 901 F.2d 438, 440 (5th Cir. 1990) ("To obtain attorney's fees under [§ 1988], a litigant must be a 'prevailing party.'"). The court rejected this same argument in *Barrow III* in denying his motion for summary judgment. In doing so, the court noted that Dr. Smith had not "obtained dismissal of Barrow's lawsuit and [had] not demonstrated how her rejection of his settlement offers entitles him to 'prevailing party' status." *Barrow III*, 2005 WL 39086. at *9. Dr. Smith lost on Barrow's parental rights claim and has still not demonstrated why rejection of his settlement offers alone entitles him to "prevailing party" status.

For the foregoing reasons, the court concludes that Dr. Smith is not entitled to recover attorney's fees under § 1988, and it denies his motion.

VII

GISD also moves for an award of attorney's fees. It appears to contend that it is entitled to such fees under § 706(k) of Title VII and § 1988, asserting that the court has discretion under these authorities to grant attorney's fees to a prevailing defendant on a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith.

A

Among her arguments, Barrow asserts the same contentions as she did in relation to Dr. Smith's motion for attorney's fees: that she prevailed on her primary claim concerning her constitutional right to exercise her choice of private religious education for her children, that all her claims were interrelated to her parental rights claim, and that only claims based on different facts and legal theories can be considered unrelated so as to allow a defendant to recover attorney's fees. The court disagrees. Although Barrow prevailed against Dr. Smith with respect to her parental rights claim, she did not prevail against GISD on that claim. Barrow has not cited any authority to suggest that her success against Dr. Smith can be imputed against GISD for purposes of determining whether GISD is entitled to attorney's fees under § 706(k) or § 1988. The court concludes that she cannot. Accordingly, Barrow's success against Dr.

Smith does not prevent GISD from recovering attorney's fees.

B

GISD is only eligible for attorney's fees under § 706(k) or § 1988 if it can show that it was a prevailing party, *see Associated Builders,* 919 F.2d at *377; Falcon v. General Telephone Co.,* 815 F.2d 317, 322 (5th Cir. 1987), and that Barrow's "action was frivolous, unreasonable, groundless, or made in bad faith,[21] or that [she] continued to litigate after it clearly became so[,]" *Trevino,* 811 F.2d at 906. In determining whether the latter showing has been made, the court focuses on whether a claim "was void of arguable legal merit or factual support" instead of "whether the claim was ultimately successful." *Jones v. Tex. Tech Univ.,* 656 F.2d 1137, 1145-46 (5th Cir. Unit A Sept. 1981). The court "should look to factors such as whether the plaintiff established *a prima facie* case, whether the defendant offered to settle, and whether the court held a full trial." *Myers v. City of W. Monroe,* 211 F.3d 289, 292 (5th Cir. 2000) (citing *United States v. Mississippi,* 921 F.2d 604, 609 (5th Cir. 1991)). GISD argues that Barrow's claims under § 1983, Title VII, § 110, and Article I, § 6 were unreasonable, without foundation, or frivolous. The court will address each claim in turn.

---

[21] GISD does not appear to rely on allegations that Barrow made her claims in bad faith.

1

There is no question that GISD is a prevailing party on Barrow's § 1983 claim. The court granted summary judgment in part as to this claim and the jury decided in GISD's favor as to the balance of the claim at trial. GISD is not entitled to attorney's fees, however, because the court is unable to conclude that the claim was unreasonable, groundless, or frivolous.

In deciding GISD's motion for summary judgment, the court held, in pertinent part, that she had "produced evidence that is sufficient to raise a genuine issue of material fact concerning whether the alleged constitutional violations occurred pursuant to a custom or practice of GISD." *Barrow I,* 2002 WL 628665, at *6. Because she in part met her burden at the summary judgment stage, Barrow was entitled to, and received, a trial on the issue. Additionally, the court declined to grant judgment as a matter of law dismissing her § 1983 cause of action after she rested her case-in-chief. Under these circumstances, the court concludes that her claim was not groundless, unreasonable, or frivolous and that GISD is not entitled to recover attorney's fees incurred in defending Barrow's § 1983 claim.

2

GISD is also a prevailing party on Barrow's Title VII claim. The court granted summary judgment with respect to Barrow's disparate treatment and impact claims on GISD's motion, and the jury ruled in its

favor on Barrow's religious accommodation claim. Although Barrow ultimately lost on her Title VII claim, she survived a motion for judgment as a matter of law at trial, and her Title VII claim was submitted to the jury for determination. Accordingly, the court cannot say that it was groundless, unreasonable, or frivolous. GISD is therefore not entitled to attorney's fees on this claim.

3

GISD is also not entitled to attorney's fees for defending against Barrow's state statutory and constitutional claims. In its motion, GISD does not appear to move for attorney's fees pursuant to Texas law, and §§ 1988 and 706(k) do not explicitly provide for the recovery of attorney's fees incurred in the defense of pendent state-law claims. Although the Fifth Circuit has at least once upheld the award of attorney's fees under § 1988 to a defendant on a federal civil rights claim and a state-law claim, it did so where the defendant was entitled to attorney's fees on the civil rights claim because it was "frivolous, unreasonable, and groundless." *See Church of Scientology v. Cazares,* 638 F.2d 1272, 1290 (5th Cir. Mar. 1981). In this case, GISD is not entitled to attorney's fees on Barrow's federal claims. GISD has not cited the court to any authority in this circuit, and the court has found none on its own, that supports a recovery of attorney's fees by a defendant under either § 1988 or § 706(k) for defending against state-law claims where the defendant was not otherwise

entitled to recover fees under these statutes for federal-law claims. Accordingly, the court declines to award attorney's fees to GISD for defending against Barrow's § 110 and Texas constitutional claims.

VIII

The court turns finally to Barrow's request that the court schedule a *Dondi*[22] conference with her counsel and Dr. Smith's counsel. She argues that Dr. Smith's counsel made numerous personal attacks against her and her attorneys in Dr. Smith's motion for attorney's fees and brief that are false, slanderous, and unprofessional. The court concludes that a *Dondi* conference is not warranted. Having reviewed the pages in Dr. Smith's brief on which Barrow relies, the court does not agree that they contain personal attacks. Rather, on these pages Dr. Smith appears to make a proffer of evidence that he intends to present on the issue of who should be charged his attorney's fees, if the court decides to award them. Accordingly, a *Dondi* conference is unnecessary, and Barrow's request is denied.

* * *

In sum, GISD's April 6, 2005 motion for attorney's fees is denied. Dr. Smith's April 8, 2005 motions for new trial, for judgment as a matter of law, to alter

---

[22] *Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n,* 121 F.R.D. 284 (N.D. Tex. 1988) (en banc) (per curiam).

or amend judgment, and for attorney's fees are denied. Barrow's May 5, 2005 request for *Dondi* conference is denied. Barrow's April 11, 2005 post-trial motion to alter or amend judgment and motion for judgment as a matter of law are denied except to the extent the court has deferred ruling on them due to the outstanding issue of Barrow's recovery of attorney's fees and costs. The court also defers a decision on Barrow's April 11, 2005 preliminary motion for attorney's fees and defers deciding her April 13, 2005 objections to GISD's bill of costs.

The additional submissions required by this memorandum opinion and order are set out *supra* at § V(C)(2).

SO ORDERED.

August 5, 2005.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW,	§	
Plaintiff,	§	
	§	
VS.	§	Civil Action No.
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al.,	§	3:00-CV-0913-D
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Mar. 25, 2005)

Following return of a jury verdict, the court is today filing a judgment in this case. The judgment does not award injunctive relief in favor of plaintiff Karen Jo Barrow ("Barrow") because defendant Dr. Herman Smith ("Dr. Smith") is no longer employed by defendant Greenville Independent School District ("GISD"), and Barrow has failed to demonstrate that Dr. Smith is likely to engage in future conduct that violates her parental rights under the First and Fourteenth Amendments to direct her children's education. For similar reasons, the court declines to enter declaratory relief.

The judgment provides that Barrow and Dr. Smith shall each bear her or his own taxable costs of court. Although Barrow has prevailed against Dr. Smith and would normally recover some, if not all, of her taxable costs as a matter of course, *see* Fed. R.

Civ. P. 54(d)(1), Dr. Smith has made Rule 68 offers of judgment that may result in denying Barrow a recovery of some of these costs. Accordingly, subject to amending this part of the judgment in response to a timely post judgment motion, the judgment provides for Barrow and Dr. Smith to bear their own taxable costs.

SO ORDERED.

March 25, 2005.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	Civil Action No.
	§	3:00-CV-0913-D
GREENVILLE INDEPENDENT	§	
SCHOOL DISTRICT, et al.,	§	
	§	
Defendants.	§	

JUDGMENT

(Filed Mar. 25, 2005)

The court filed memorandum opinions and orders granting in part and denying in part a motion to dismiss and motions for summary judgment filed by defendants Greenville Independent School District ("GISD") and Dr. Herman Smith ("Dr. Smith"). Thereafter, the parties tried this case to a jury, which today returned a verdict partially in favor of plaintiff Karen Jo Barrow ("Barrow"), partially in favor of Dr. Smith, and in favor of GISD.

For the reasons set out in memorandum opinions and orders filed July 14, 2000, April 18, 2002, January 7, 2005, and today, and based on the jury verdict, it is ordered and adjudged that Barrow recover judgment from Dr. Smith in the principal sum of $15,455.00 for compensatory damages, together with prejudgment interest thereon at the rate of 3.31% per annum simple interest, which does not compound,

from May 1, 2000 to March 24, 2005, and post-judgment interest thereon at the rate of 3.31% per annum. It is further ordered and adjudged that Barrow recover judgment from Dr. Smith in the principal sum of $20,000.00 for punitive damages, together with post-judgment interest thereon at the rate of 3.31% per annum.

Barrow's action against GISD is dismissed with prejudice, and all relief that she seeks against GISD is denied.

GISD's taxable costs of court, as calculated by the clerk of court, are assessed against Barrow. Barrow and Dr. Smith shall each bear her or his own taxable costs of court.

With the exception of attorney's fees, if any, that the court may award separately after timely application, all relief that any party seeks in this lawsuit that is not awarded by this judgment is hereby denied.

Done at Dallas, Texas this 25th day of March, 2005.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW,	§	
Plaintiff,	§	
VS.	§	Civil Action No.
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al.,	§	3:00-CV-0913-D
Defendants.	§	

COURT'S CHARGE TO THE JURY

(Filed Mar. 25, 2005)

MEMBERS OF THE JURY:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of

the law other than that given in these instructions, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. The parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated in these instructions, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community and holding the same or similar stations in life. The law is no respecter of persons, and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses, including the deposition testimony admitted, the exhibits admitted in the record, and the stipulated facts. Stipulated facts must be regarded as proven facts. The term "evidence" does not include anything that I have instructed you to disregard.

Evidence admitted before you for a limited purpose may not be considered for any purpose other than the limited purpose for which it was admitted.

Remember that any statements, objections, or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case and, in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you. If an attorney's question contained an assertion of fact that the witness did not adopt, the assertion is not evidence of that fact.

You are not bound by any opinion that you might think I have concerning the facts of this case, and if I have in any way said or done anything that leads you to believe that I have any opinion about the facts in this case, you are instructed to disregard it. Further, nothing in these instructions to you is made for the purpose of suggesting or conveying to you an intimation as to what verdict I think you should find.

Although you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead

you to draw from the facts established by the evidence in the case.

You should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" exists when the evidence directly establishes the facts that a party asserts to be true, such as by an eyewitness or in a document. "Circumstantial evidence" is proof of a chain of facts and circumstances that, without going directly to prove the existence of an essential fact, gives rise to a logical inference that such fact does actually exist. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the "credibility" or believability of each witness and the weight to be given to the witness' testimony. In weighing the testimony of a witness, you should consider the witness' relationship to a particular party; the witness' interest, if any, in the outcome of the case; the witness' manner of testifying; the witness' opportunity to observe or acquire knowledge concerning the facts about which the witness testified; the witness' candor, fairness, and intelligence; and the extent to which the witness' testimony has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness, in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be "impeached" or discredited by contradictory evidence, by a showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness' present testimony. If you believe that any witness has been so impeached, it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you think it deserves.

The rules of evidence provide that if scientific, technical, or other specialized knowledge will assist the jury to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify and state an opinion concerning such matters if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts in the case.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the

opinion of an expert witness is not based upon sufficient knowledge, skill, experience, training, or education, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is not based upon sufficient facts or data, or that the opinion is outweighed by other evidence, or that the opinion is not the product of reliable principles and methods, or that the witness has not applied the principles and methods reliably to the facts in the case, then you may disregard the opinion entirely.

The party with the burden of proof on a claim or defense must meet that burden by a preponderance of the evidence. A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. To prove a fact by a "preponderance of the evidence" merely means to prove that the fact is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

If the proof should fail to establish any essential element of the claim or defense by a preponderance of the evidence, the jury must find against the party with the burden of proof.

As used in this charge, the term "Barrow" means plaintiff Karen Jo Barrow, "GISD" means defendant Greenville Independent School District, "Dr. Smith" means defendant Dr. Herman Smith, and "Mr. Smith" means William Smith, the current GISD Superintendent

The parties have stipulated to the following facts that are pertinent to the issues before you. As I have instructed you above, these facts must be regarded as proven facts.

1. In the summer of 1998 Barrow was employed by GISD as a teacher.

2. Dr. Smith was employed by GISD as Superintendent.

3. Mr. Smith was employed by GISD as an Assistant Superintendent. Mr. Smith's duties as Assistant Superintendent included the job of Personnel Director.

4. Currently, Barrow is employed by GISD as Principal of Greenville High School. Barrow's history of promotions within GISD includes (1) a promotion to the position of Assistant Principal of Greenville High School in August 2001 and (2) a promotion to the position of Principal of Greenville High School on June 21, 2004.

5. Dr. Smith left his employment with GISD in July 2001.

6. Currently, Mr. Smith is employed by GISD as Superintendent, having been promoted to that position on August 21, 2001.

7. In the summer of 1998 an administrative position became open at GISD, that of Assistant Principal of the Middle School.

8. Barrow has been employed continuously by the GISD since 1995.

9. Barrow is married.

10. Barrow's children are enrolled in the Greenville Christian School.

11. On July 13, 1998 Dr. Smith convened a Superintendent's Council meeting in which Senior Administrators of the GISD met to discuss applicants for the Assistant Principal's position at the Middle School.

12. Dr. Smith recommended Susan Crow to the Board of Trustees for the position of Assistant Principal at the Middle School in July 1998.

13. In August 2001 Barrow applied for an administrator's job with the GISD and was recommended by the new Superintendent, Mr. Smith, to be the Assistant Principal for the High School.

14. In August 2001 the Board hired Barrow as an Assistant Principal of the High School.

BARROW'S PARENTAL AND RELIGIOUS RIGHTS CLAIM

Barrow contends that, by denying her an interview for or a promotion to Assistant Principal of the Middle School, GISD and Dr. Smith, while acting "under color of state law," intentionally deprived her of parental and religious rights under the Constitution of the United States to educate her children in private school. GISD and Dr. Smith deny that they intentionally deprived her of these rights. GISD also denies that an "official policy" of GISD caused her to be deprived of these rights.

Public school employees have rights protected under the Constitution of the United States to choose to educate their children in private school, including a private school that provides a religious education. They have parental rights under the First and Fourteenth Amendments to direct their children's educations, and they have the right under the Free Exercise Clause of the First Amendment to freely exercise their religious faith by choosing to educate their children in a religious educational institution. A school district cannot take an adverse employment action against a public school employee for exercising these rights. Barrow does not have to prove that any action taken against her was because of her religion. The refusal to interview or promote someone is an adverse employment action within the meaning of the law.

Under 42 U.S.C. § 1983, a person may sue for an award of money damages anyone who, "under color" of any State law or custom, intentionally violates her rights under the Constitution of the United States.

To establish this claim against Dr. Smith, Barrow must prove each of the following essential elements by a preponderance of the evidence:

> *First,* that the actions of Dr. Smith were "under color" of the authority of the State of Texas;
>
> *Second,* that Barrow's exercise of her constitutional parental and/or religious rights was a substantial or motivating factor in the decision not to interview her for and/or promote her to the position of Assistant Principal of the Middle School; *and*
>
> *Third,* that the acts of Dr. Smith were the proximate or legal cause of Barrow's damages.

To establish this claim against GISD, Barrow must prove each of the following essential elements by a preponderance of the evidence:

> *First,* that the actions of GISD were "under color" of the authority of the State of Texas;
>
> *Second,* that Barrow's exercise of her constitutional parental and/or religious rights was a substantial or motivating factor in the decision not to interview her for and/or promote her to the position of Assistant Principal of the Middle School;

Third, that the acts of GISD were the proximate or legal cause of Barrow's damages; *and*

Fourth, that Barrow was injured as the proximate or legal result of an "official policy" of GISD.

State or local officials act "under color" of the authority of the State when they act within the limits of their lawful authority. However, they also act "under color" of the authority of the State when they act without lawful authority or beyond the bounds of their lawful authority if their acts are done while the officials are purporting or pretending to act in the performance of their official duties. An official acts "under color" of the state authority if he abuses or misuses a power that he possesses only because he is an official.

An act is the proximate or legal cause of damages if it appears from the evidence that the act played a substantial part in bringing about or actually causing the damages. An act is a proximate cause of damages if the damages were a reasonably foreseeable consequence of the act.

For you to find in Barrow's favor on her claim against GISD, she must prove that she was injured as the proximate or legal result of an "official policy" of GISD. "Official policy" means a persistent, widespread practice of GISD officials or employees that, although not authorized by officially-adopted and -promulgated policy, is so common and well settled as

to constitute a custom that fairly represents GISD policy. Where the final policymaking body of a governmental entity acquires actual or constructive knowledge of an allegedly-unconstitutional custom practiced by an employee, such knowledge may form the basis for liability. Actual or constructive knowledge of such custom must be attributable to the governing body of the district or to an official to whom that body had delegated policymaking authority. Under Texas law, the final policymaking authority in an independent school district rests with the district's trustees. Dr. Smith was not a final policymaker concerning which candidates to interview for the job of Assistant Principal of the Middle School. He functioned as a decisionmaker rather than as a policymaker. Actual knowledge may be shown by such means as discussion at board meetings or receipt of written information. Constructive knowledge may be attributed to GISD's Board of Trustees on the ground that it would have known of the violations if it had properly exercised it [sic] responsibilities, such as where the violations were so persistent or widespread that they were the subject of prolonged public discussion or of a high degree of publicity.

Barrow must identify the purported policy that she claims constitutes a violation of her rights, show that the policy is attributable to GISD itself, and establish that she incurred her injury because of the application of that specific policy. She must demonstrate that GISD, through its deliberate conduct, was the moving force behind the injury or harm suffered,

and she must establish a direct causal link between GISD's action and the deprivation of a federally-protected right. Liability must rest on official policy, meaning GISD's policy, not the policy of an individual official.

Defendants contend that all persons applying for jobs with GISD must submit written applications in order to be considered for the jobs, that Barrow did not submit a timely written application for the job of Assistant Principal of the Middle School, and that, as a result of this failure, she was not eligible to be considered. Barrow contends there was no requirement to file a written application. Barrow also contends that she did not apply because doing so would have been futile. Under the law, a person need not have applied for a job if her application would have been futile. Barrow has the burden of proving futility. To do so, she must prove that she was a potential victim of unlawful discrimination and that she would have applied for the job had it not been for the discriminatory practice.

QUESTION NO. 1:

Did Barrow prove her parental and/or religious rights claim against the defendant in question?

> *Instruction*: Barrow has the burden of proof. If she has met her burden, answer "Yes;" otherwise, answer "No." Answer separately in the spaces below.

ANSWER:

Against GISD:	Parental Rights Claim?	Religious Rights Claim?
Failure to Interview?	No	No
Failure to Promote?	No	No
Against Dr. Smith:	Parental Rights Claim?	Religious Rights Claim?
Failure to Interview?	Yes	No
Failure to Promote?	Yes	No

If you have answered Question No. 1 "Yes" in at least one space, read the following instructions regarding compensatory damages and answer Question No. 2. Otherwise, proceed to the court's instructions concerning Barrow's Title VII religious accommodation claim.

COMPENSATORY DAMAGES

If you find that a defendant is liable to Barrow, then you must determine an amount that is fair compensation for all of Barrow's damages. These damages are called compensatory damages. The purpose of compensatory damages is to make the plaintiff whole – that is, to compensate Barrow for the damage that she has suffered. You should not interpret the fact that I am giving you instructions

about damages as an indication in any way that I believe that Barrow should, or should not, win this case. I am instructing you on damages only so that you will have guidance in the event you decide that a defendant is liable and that Barrow is entitled to recover damages.

You may award compensatory damages only for injuries that the Barrow proves were proximately caused by the defendant's allegedly-wrongful conduct. The damages that you award must be fair compensation for all of Barrow's damages, no more and no less. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize a defendant. You should not award compensatory damages for speculative injuries, but only for those injuries that Barrow has actually suffered or that she is reasonably likely to suffer in the future. Also, do not include in any award of compensatory damages any amount for attorney's fees or court costs that Barrow may have incurred. This is a matter for the court to decide.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that Barrow prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence:

A. Damages Accrued

If you find for the plaintiff, she is entitled to recover an amount that will fairly compensate her for any damages she has suffered to date. As used in this charge, the term "lost earnings" includes lost salary and employment benefits

B. Calculation of Future Damages

If you find that the plaintiff is reasonably certain to suffer damages in the future from her injuries, then you should award her the amount you believe would fairly compensate her for such future damages.

C. Reduction of Future Damages to Present Value

An award of future damages necessarily requires that payment be made now for a loss that Barrow will not actually suffer until some future date. If you should find that she is entitled to future damages, including future earnings, then you must determine the present worth in dollars of such future damages.

If you award damages for loss of future earnings, you must consider two particular factors:

1. You should reduce any award by the amount of the expenses that the plaintiff would have incurred in making those earnings.

2. If you make an award for future loss of earnings, you must reduce it to present value by considering the interest that the plaintiff could earn on the amount of the award if she made a relatively risk-free investment. The reason why you must make this reduction is because an award of an amount representing future loss of earnings is more valuable to the plaintiff if she receives it today than if she received it in the future, when she would otherwise have earned it. It is more valuable because the plaintiff can earn interest on it for the period of time between the date of the award and the date she would have earned the money. Thus you should adjust the amount of any award for future loss of earnings by the amount of interest that the plaintiff can earn on that amount in the future.

A person who claims damages resulting from the wrongful act of another has a duty under the law to use reasonable diligence to mitigate -- that is, to avoid or minimize – those damages.

If you find a defendant is liable and that Barrow has suffered damages, she may not recover for any item of damage that she could have avoided through reasonable effort. If you find by a preponderance of the evidence that Barrow unreasonably failed to take

advantage of an opportunity to lessen her damages, you should deny her recovery for those damages that she would have avoided had she taken advantage of the opportunity.

You are the sole judge of whether Barrow acted reasonably in avoiding or minimizing her damages. An injured plaintiff may not sit idly by when presented with an opportunity to reduce her damages. However, she is not required to exercise unreasonable efforts or incur unreasonable expenses in mitigating the damages. The defendant in question has the burden of proving the damages that Barrow could have mitigated. In deciding whether to reduce Barrow's damages because of her failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the defendant in question has satisfied the burden of proving that Barrow's conduct was not reasonable.

QUESTION NO. 2:

What amount of compensatory damages, if any, should be awarded to Barrow?

> *Instruction:* Barrow has the burden of proof. The defendant in question has the burden of proving the defense of failure to mitigate damages. Answer in dollars and cents, if any. Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one

element in the other element. Do not include interest on any amount of damages you find.

ANSWER:

Lost earnings in the past	15,455.00
Lost earnings that she is likely to suffer in the future	0

If you have answered Question No. 2 by stating a sum of money greater than "0" in either space, do not consider the following instructions regarding nominal damages or answer Question No. 3; instead, proceed to the court's instructions concerning punitive damages and answer Question No. 4.

NOMINAL DAMAGES

Nominal damages are permitted in an action brought under 42 U.S.C. § 1983. Nominal damages may be awarded when no actual injury of any consequence is established, to make the symbolic point that the plaintiff was wronged and that society demands that constitutional rights be scrupulously observed. If you have answered Question No. 1 "Yes" in at least one space, but you have answered "0" in both spaces in answer to Question No. 2, that is, you have found that Barrow has failed to prove that she is entitled to recover any compensatory damages, then you may return a verdict for Barrow in a nominal sum, such as one dollar. This is because a plaintiff

may recover nominal damages when a violation of her constitutional rights does not result in actual injury.

QUESTION NO. 3:

What amount of nominal damages should be awarded to Barrow?

Instruction: Answer in dollars and cents.

ANSWER: _____

If you have answered Question No. 1 "Yes" in at least one space as to Dr. Smith, read the following instructions regarding punitive damages and answer Question No. 4. Otherwise, proceed to the court's instructions concerning Barrow's Title VII religious accommodation claim.

PUNITIVE DAMAGES

If you find that Dr. Smith is liable for Barrow's injuries, you must award her the compensatory damages she has proved. You may, but are not required to, award punitive damages. The purpose of an award of punitive damages is to punish the defendant and to deter him and others from acting as he did.

You may award punitive damage if Barrow has proved that Dr. Smith acted with callous or reckless indifference to her rights. To find that Dr. Smith acted with reckless indifference, you must find that he acted although he perceived a risk that his acts

would violate Barrow's rights. A person does not act with callous or reckless indifference to another person's rights if he acts with the distinct belief that his acts are lawful.

In making an award of punitive damages, you should consider that the purposes of punitive damages are to punish a defendant and to deter him and others from engaging in similar conduct in the future. The law does not require you to award punitive damages; however, if you decide to make such an award, you must use sound reason in setting the amount. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. It should be presumed that a plaintiff has been made whole by compensatory damages, so punitive damages should be awarded only if the defendant's misconduct, after having paid compensatory damages, warrants the imposition of further sanctions to achieve punishment or deterrence. You may consider the financial resources of the defendant in fixing the amount of punitive damages.

QUESTION NO. 4:

What sum of money do you find should be awarded to Barrow against Dr. Smith as punitive damages?

Instruction: Barrow has the burden of proof. Answer in dollars and cents, if any.

ANSWER: 20,000

BARROW'S TITLE VII RELIGIOUS ACCOMMODATION CLAIM

Barrow contends that GISD failed reasonably to accommodate her religious beliefs and practices by denying her an interview for or a promotion to Assistant Principal of the Middle School, in violation Title VII of the Civil Rights Act of 1964. Title VII makes it unlawful for an employer to discriminate against any individual with respect to her terms, conditions, or privileges of employment, because of her religion. Under Title VII, the term "religion" includes all aspects of religious observance and practice, as well as belief. GISD denies that it violated Barrow's rights under Title VII.

To establish this claim, Barrow must prove each of the following essential elements by a preponderance of the evidence:

> *First,* that she has a bona fide religious belief, observance, or practice that conflicted with an employment requirement;
>
> *Second,* that she informed GISD of this belief, observance, or practice; *and*
>
> *Third,* that she was denied an interview for or a promotion to the position of Assistant Principal of the Middle School for failure to comply with the conflicting requirement.

For purposes of Barrow's Title VII claim, you are instructed that an act of a GISD employee taken while acting within the scope of the authority delegated to the person by GISD, or within the scope of

the person's duties, can bind GISD, so that such acts are deemed to be the acts of GISD. This instruction does not apply to Barrow's claim, discussed earlier in this charge, brought under 42 U.S.C. § 1983.

QUESTION NO. 5:

Did Barrow prove her Title VII claim against GISD?

Instruction: Barrow has the burden of proof. If she has met her burden, answer "Yes;" otherwise, answer "No." Answer separately in the spaces below.

ANSWER: Failure to Interview? No

Failure to Promote? No

If you have answered Question No. 5 "Yes" in at least one space, read the following instructions regarding damages and answer Question No. 6; otherwise, proceed to the court's instructions concerning jury deliberations.

DAMAGES

If you find that GISD is liable for violating Title VII, then you must determine an amount that is fair compensation for Barrow's damages.

You should not interpret the fact that I am giving you instructions about damages as an indication in any way that I believe that Barrow should, or should

not, prevail on this claim. It is your first task to decide whether GISD is liable. I am instructing you on damages only so that you will have guidance in the event you decide that GISD is liable for violating Title VII and that Barrow is entitled to recover damages.

You may award compensatory damages only for injuries that Barrow proves were caused by GISD's violation of Title VII. The damages that you award must be fair compensation for all of Barrow's damages, no more and no less. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize GISD.

Back pay is the amount of money that, as of the date of trial, would put Barrow in the same position that she would have held but for the denial of the promotion. In other words, back pay is the value of wages and employee benefits (including pension and other retirement benefits) that Barrow would have received, less the amounts she actually earned from other employment, from the date she was not promoted to Assistant Principal of the Middle School until the present.

A person who claims damages resulting from the wrongful act of another has a duty under the law to use reasonable diligence to mitigate – that is, to avoid or minimize – those damages.

If you find that GISD is liable and that Barrow has suffered damages, she may not recover for any item of damage that she could have avoided through reasonable effort. If you find by a preponderance of

the evidence that Barrow unreasonably failed to take advantage of an opportunity to lessen her damages, you should deny her recovery for those damages that she would have avoided had she taken advantage of the opportunity.

You are the sole judge of whether Barrow acted reasonably in avoiding or minimizing her damages. An injured plaintiff may not sit idly by when presented with an opportunity to reduce her damages. However, she is not required to exercise unreasonable efforts or incur unreasonable expenses in mitigating the damages. GISD has the burden of proving the damages that Barrow could have mitigated. In deciding whether to reduce Barrow's damages because of her failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether GISD has satisfied the burden of proving that Barrow's conduct was not reasonable.

Front pay is the loss of future compensation and employee benefits that Barrow would receive after the date of trial had GISD promoted her in 1998 to the job of Assistant Principal of the Middle School. You must deduct from any front pay award any compensation, other employment earnings, and employment benefits that Barrow would receive after the date of trial, using reasonable mitigation efforts.

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion

in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guess work. On the other hand, the law does not require that Barrow prove her losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

QUESTION NO. 6:

What amount of damages, if any, should be awarded to Barrow?

Instruction: Barrow has the burden of proof. GISD has the burden of proving its defense of failure to mitigate damages. Answer in dollars and cents, if any. Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in the other element. Do not include interest on any amount of damages you find.

ANSWER:

Back pay _____

Front Pay _____

Jury Deliberations

The fact that I have given you in this charge instructions about a particular claim or defense, or that I have not so instructed you, should not be

interpreted in any way as an indication that I believe a particular party should, or should not, prevail in this case.

In order to return a verdict your verdict must be unanimous. It is your duty as jurors to consult one another and to deliberate with a view towards reaching an agreement. Each of you must decide the case for yourself, but only after an impartial consideration with each other of all the evidence in the case. In the course of your deliberations, do not hesitate to reexamine your own view and change your opinion if convinced it is erroneous. Do not, however, surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors or for the mere purpose of returning a verdict. Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

After I finish reading this charge, you will retire to the jury room. I will send you the exhibits that have been admitted into evidence. You will first select one member of the jury to act as presiding juror. The presiding juror will preside over your deliberations and will speak on your behalf here in court.

Do not deliberate unless all members of the jury are present in the jury room. In other words, if one or more of you go to lunch together or are together outside the jury room, do not discuss the case.

When you have reached unanimous agreement as to your verdict, the presiding juror shall fill in your

answers to the questions on a copy of the charge that I will provide to you for this purpose, shall date and sign the last page of that copy of the charge, and shall notify the court security officer that you have reached a verdict. The court security officer will then deliver the verdict to me.

The court will honor the schedule you set for your deliberations and your requests for breaks during your deliberations. From time to time I may communicate with you concerning your schedule. This is done primarily for the purpose of anticipating the court's staffing needs, and is not in any way intended to suggest that your deliberations should be conducted at a different pace or on a different schedule.

During the trial, the court reporter made a verbatim record of the proceedings. The court rules do not provide for testimony to be produced for the jury in written form, or for testimony to be read back to the jury as a general aid in refreshing the jurors' memories. In limited circumstances, the court may direct the court reporter to read testimony back to the jury in open court. This is done, however, only when the jury certifies that it disagrees as to the testimony of a particular witness, and identifies the specific testimony in dispute.

If, during your deliberations, you desire to communicate with me, your presiding juror will reduce your message or question to writing, sign it, and pass the note to the court security officer, who will bring it to my attention. I will then respond as promptly as

possible, either in writing or by asking you to return to the courtroom so that I can address you orally. If you do send a message or ask a question in which you indicate that you are divided, never state or specify your numerical division at the time.

March 24, 2005.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

The foregoing is the unanimous verdict of the jury.

Dated: 3/25/05

/s/ Mark S. [Illegible]
Presiding Juror

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW,	§	
Plaintiff,	§	
VS.	§	Civil Action No.
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al.,	§	3:00-CV-0913-D
Defendants.	§	

ORDER

(Filed Mar. 10, 2005)

At the pretrial conferences on March 4 and 9, 2005, the court considered the parties' positions concerning whether defendants Greenville Independent School District ("GISD") and Dr. Herman Smith ("Dr. Smith") may rely at trial on the defense that plaintiff Karen Jo Barrow's ("Barrow's") exercise of her constitutional right to educate her children in private school materially and substantially impedes the operation or effectiveness of the state's educational program. The court concludes that this is a defense that defendants were required to plead and that allowing them to plead the defense for the first time in their amended answers filed February 4, 2005 would result in unfair surprise to Barrow. Accordingly, the court holds that defendants are precluded from relying on this defense at trial.

The court agrees with Barrow that this is a defense that defendants were required to plead. This is because the contention that the exercise of Barrow's constitutional right to educate her children in private school materially and substantially impedes the operation or effectiveness of the state's educational program concerns a matter outside her prima facie case. *See, e.g.*, 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1271, at 585 (3d ed. 2004) ("Generally speaking, [Fed. R. Civ. p. 8(c)]'s reference to 'an avoidance or affirmative defense' encompasses two types of defensive allegations: those that admit the allegations of the complaint but suggest some other reason why there is no right of recovery, and those that concern allegations outside of the plaintiff's prima facie case that the defendant therefore cannot raise by a simple denial in the answer." (footnote omitted)). The Fifth Circuit's opinion in *Barrow v. Greenville Independent School District*, 332 F.3d 844 (5th Cir.), *cert. denied*, 540 U.S. 1005 (2003), makes clear that "[t]he state cannot take an adverse employment action against a public-school employee for exercising this right unless it can prove that the employee's selection of private school materially and substantially affects the state's educational mission," *id.* at 848. The court disagrees with the assertion of Dr. Smith's counsel during the pretrial conference that this defense is fairly found within the affirmative defenses pleaded in earlier versions of his answer.

The court recognizes that "'where [an affirmative defense] is raised in the trial court in a manner that does not result in unfair surprise, . . . technical failure to comply with Rule 8(c) is not fatal.'" *Ingraham v. United States,* 808 F.2d 1075, 1079 (5th Cir. 1987) (quoting *Bulli's Corner Rest. v. Dir., Fed. Emergency Mgmt. Agency,* 759 F.2d 500, 502 (5th Cir. 1985)). In this case, however, neither defendant pleaded the defense that Barrow's exercise of her constitutional right to educate her children in private school materially and substantially impeded the operation or effectiveness of GISD's educational program. Neither gave Barrow notice that she was required to develop her own evidence to refute the defense or that any pretrial discovery that arguably bore a relationship to the defense was being conducted for that purpose. Until GISD filed its February 4, 2005 answer, it had admitted the truth of ¶ 7.10 of Barrow's original complaint and first amended original complaint. And Dr. Smith's defense of qualified immunity was based on other grounds.

In reaching this decision, the court is not precluding a defendant from introducing evidence of this type if relevant for another purpose, such as addressing whether Dr. Smith should be held liable for punitive damages. The court will decide whether the specific evidence offered is relevant and admissible, if and when offered.

SO ORDERED.

March 10, 2005.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW, Plaintiff, VS. GREENVILLE INDEPENDENT SCHOOL DISTRICT and DR. HERMAN SMITH Defendants.	*	Civil No. 3:00-CV-0913-D

REPORT

(Filed Jul. 27, 2004)

Before the Court for non-binding arbitration are Plaintiff's First Amended Arbitration Fee Application ("Fee Application"), filed May 21, 2004, and the response thereto.[1] In the most unreasonable fee application this Court has reviewed in 25 years on the district bench, Plaintiff's counsel seek $1,219,472.50 in attorney fees pursuant to 42 U.S.C. § 1988 for legal services performed on behalf of a client who suffered compensatory damages of approximately $45,000. The application is particularly extraordinary when

[1] Plaintiff's First Amended Arbitration Fee Application, filed May 21, 2004, incorporates by reference the evidence in support of Plaintiff's Arbitration/Settlement Fee Application, submitted March 29, 2004.

one considers that this case is a civil rights action of an uncomplicated nature in which no new legal principle was involved or announced. *See Barrow v. Greenville Indep. Sch. Dist.*, 332 F.3d 844, 849 (5th Cir. 2003) (holding that the right at issue was "clearly established"). Plaintiff's counsel also seek $113,843.78 in costs and expenses.

I. Background

This case is pending before United States District Judge Sidney A. Fitzwater. Judge Fitzwater requested the undersigned, Judge Barefoot Sanders, to review the fees and expenses application of Plaintiff for the period through March 2004, in the hope of facilitating settlement. (*See* Order, entered March 8, 2004.)

Plaintiff Karen Jo Barrow filed this case on May 1, 2000, against Defendants Greenville Independent School District ("GISD") and Dr. Herman Smith ("Dr. Smith"), the superintendent of GISD during the events giving rise to this case. Beginning in 1995, Plaintiff was employed by Defendant GISD as a teacher. (P.'s 2d Am. Compl. at 8.) Plaintiff alleges that, beginning in February 1998, she was recruited by the principal of Greenville Middle School for the position of assistant principal. (*Id.* at 9.) Although Plaintiff was qualified for, and expressed an interest in, the position, Plaintiff claims that Dr. Smith would not consider her for the position of assistant principal unless she enrolled her children in GISD schools. (*Id.*

at 10-16.) Plaintiff's children attended a private religious school. (*Id.* at 17.) Plaintiff refused to transfer her children from their private religious school and was not interviewed for, or subsequently offered, the position of assistant principal. (*Id.* at 18.) Plaintiff claims that the only reason she was not offered the position of assistant principal was her decision to educate her children in a private religious school. (*Id.* at 18-19.) Plaintiff claims that she did not apply for other available administrative positions in 1999 and 2000 because Dr. Smith was still the superintendent, and she believed that such applications would have been futile. (*Id.* at 26.) In August 2001, however, after Dr. Smith left GISD, Plaintiff applied for, and was hired as, the assistant principal of the GISD high school. (*Id.* at 27.)

On May 7, 2002, Plaintiff filed her Second Amended Complaint, in which she asserts causes of action pursuant to 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, as amended. (*Id.* at 38, 39.) Plaintiff also seeks a declaratory judgment that certain policies of GISD and of its school officials are unconstitutional. (*Id.* at 44.) Finally, Plaintiff seeks punitive damages against both Defendants and a change in GISD policy. (*Id.* at 45-46.)

On October 1, 2001, Dr. Smith moved for summary judgment on the basis of qualified immunity. (*See* Motion for Summary Judgment, filed October 1, 2001.) Judge Fitzwater upheld Dr. Smith's defense and granted Dr. Smith's motion for summary judgment. (*See* Memorandum Opinion and Order, entered

February 20, 2002.) Plaintiff appealed, and the Fifth Circuit reversed Judge Fitzwater's decision. *See generally Barrow v. Greenville Indep. Sch. Dist.*, 332 F.3d 844 (5th Cir. 2003). The Fifth Circuit held that public school employees have a clearly established right to educate their children in private schools and that "state action that interferes with this protected right is unsustainable unless proved to further a state interest." *Id.* at 849. After almost four years of highly contentious litigation, including an appeal to the United States Court of Appeals for the Fifth Circuit, this case remains pending. Plaintiff's expert opines that Plaintiff's compensatory damages are approximately $45,000; Defendants dispute that Plaintiff suffered $45,000 in compensatory damages. (D.s' App. Vol. 3 at 5; D.s' Resp. at 79.) (The Court finds nothing in this record that would support an award of punitive damages.)

In December 2003, Plaintiff's counsel informed Judge Fitzwater that settlement negotiations had stalled. (*See* Status Report on Settlement, filed December 18, 2003.) It is this Court's understanding that the main reason the Parties have been unable to settle this case is that they cannot agree on the attorney fees to which Plaintiff's counsel would be entitled pursuant to 42 U.S.C. § 1988. In their report to Judge Fitzwater on December 3, 2003, Plaintiff's counsel submitted "unredacted time records" to "afford Defendants a general understanding of the rough time spent by Plaintiff's counsel in prosecuting the case." (*See id.*) In that submission,

which incorporated Plaintiff's settlement demand and unredacted time records, Plaintiff's counsel asserted that their attorney fees through July 31, 2003, totaled $2,300,330.33. (*See* D.s' App. Vol. 3 at 56.) Plaintiff's counsel calculated this amount using an hourly rate for attorney William Charles Bundren ("Mr. Bundren") of between $475-$700 per hour. (*See id.* at 38.)

On March 29, 2004, Plaintiff's counsel submitted to Judge Sanders their Arbitration/Settlement Fee Application, consisting of four volumes and totaling 901 pages. The Court notes that Volume 4, pages 548-855, consists entirely of pleadings and briefs previously filed with the Court, a copy of the Court's docket sheet, and a copy of the Fifth Circuit's opinion. During the course of this proceeding before Judge Sanders, Plaintiff's counsel have filed numerous meritless motions and sent the Court lengthy and unnecessary letters. As an example, on May 20, 2004, Mr. Bundren sent a letter to the Court certifying that he had read the Northern District of Texas's Civil Justice Expense and Delay Reduction Plan and *Dondi Property Corp. v. Commerce Savings and Loan Assoc.*, 121 F.R.D. 284 (N.D. Tex. 1988), in accordance with this Court's Order of May 13, 2004. Although Mr. Bundren certified his compliance with the Court's Order in the first two sentences of his letter, the letter totaled 18 pages and contained 50 exhibits,

totaling an additional 174 pages.[2] The Court ordered counsel not to write letters to the Court. (*See* Order, entered May 27, 2004.) The Court finds this letter typical of Mr. Bundren's representation before Judge Sanders in this case.

After supplementing their Fee Application, Plaintiff's counsel now ask the Court to award a total of $1,219,472.50 in attorney fees and $113,843.78 in costs and expenses, for a total award of $1,333,316.28. (P.'s 1st Am. Fee App. at 2-3.) Plaintiff's counsel assert that Mr. Bundren worked a total of 2,467.45 hours on the case at an hourly rate of $450 per hour and that Kelly Shackelford ("Mr. Shackelford") worked a total of 272.8 hours on the case at an hourly rate of $400 per hour. (*See* P.'s App. Vol. 2 at 75-303.)

On June 14, 2004, Defendants submitted to Judge Sanders their joint Response and Objections to Plaintiff's Fee Application. Defendants make general and specific objections to the Fee Application and assert that Plaintiff's counsel should be awarded no fees or, in the alternative, that their fees should be substantially reduced because of "the multitude of problems with [the Fee Application] and because of Mr. Bundren's apparent efforts to obfuscate the issues." (*See* D.s' Resp. at 92.) Defendants also object

---

[2] Indeed, the length and tone of Mr. Bundren's letter belied his certification that he had read the Civil Justice Expense and Delay Reduction Plan or the *Dondi* opinion.

to Plaintiff's counsels' claimed expenses. (*Id.* at 51-67.) The Court will address these issues below.

II. Analysis

A. *Attorney Fees*

1. Primary Recommendation

As noted above, Plaintiff's counsel seek a total of $1,219,472.50 in attorney fees. (P.'s 1st Am. Fee App. at 2-3.) Specifically, Mr. Bundren seeks $1,110,352.50 for 2,467.45 hours of work at $450 per hour, and Mr. Shackelford seeks $109,120.00 for 272.8 hours of work at $400 per hour. (P.'s App. Vol. 2 at 75-303.) Plaintiff's counsel seek these fees pursuant to 42 U.S.C. § 1988. Section 1988(b) provides that "[i]n any action or proceeding to enforce a provision of [42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). The Fifth Circuit has interpreted the district court's discretion to deny attorney fees to be "extremely narrow," and, "absent special circumstances that would render such an award unjust, a prevailing plaintiff should be awarded § 1988 fees '*as a matter of course.*'" *Scham v. District Courts Trying Criminal Cases,* 148 F.3d 554, 557 (5th Cir. 1998) (J. Wiener) (citations omitted) (emphasis in original).

However, the Fifth Circuit also held that the submission of an application for attorney fees that is so excessive that it "shocks the conscience of the court" is one of the special circumstances in which a

total denial of fees may be warranted. *Id.* In so holding, the Fifth Circuit recognized that

> [i]f . . . the court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such conduct would be reduction of their fee to what they should have asked for in the first place. To discourage such greed a severer reaction is needful.

Id. at 558 (quoting *Brown v. Stackler,* 612 F.2d 1057, 1059 (7th Cir. 1980)). For the following reasons, the Court finds that Plaintiff's counsels' request for more than $1.2 million in attorney fees is so excessive that it shocks the conscience of the Court.

First of all, this is not a complicated case; it involves straightforward facts, one plaintiff and two defendants, limited compensatory damages, and no new statutory or constitutional principles. Additionally, Plaintiff's counsel should have been aware at the time they submitted the Fee Application that it was excessive. On July 30, 2003, United States District Judge Sam A. Lindsay entered an Amended Memorandum Opinion and Order addressing Mr. Bundren's application for attorney fees pursuant to § 1988 in the civil rights case of *Williams v. Kaufman County,* 3:97-CV-0875-L. In *Williams,* Mr. Bundren originally requested a total of $979,746.50 in attorney fees. (*See* Am. Memorandum Opinion and Order at 10.) After finding the requested fees "exorbitant" and

ordering the Parties to meet and attempt to reduce the hours claimed, Judge Lindsay awarded a total of $373,555.45 in attorney fees, a reduction of approximately 61 percent. (*Id.*) Such a drastic reduction from his original request in the *Williams* case, a case with 17 original plaintiffs, three of whom went to trial, should have alerted Mr. Bundren that an even larger request in this less complex case – which has not yet gone to trial-was excessive.

The Court acknowledges that a total denial of attorney fees is a drastic recommendation. However, the Court believes that to do less would "serve to condone and encourage" Plaintiff's counsel to continue to submit outrageous fee applications. *Scham,* 148 F.3d at 559. The Court reasonably assumes that Plaintiff's counsel

> intended to submit an outrageously excessive fee petition in the hope that the district court would at least award some, preferably high, percentage of the requested fees. We believe Congress did not intend to foster such gamesmanship when it enacted the Civil Rights Attorney's Fee Act of 1976. Rather, the clear intent of Congress was to provide reasonable fees to prevailing parties. Our decision today seeks to further that purpose by encouraging attorneys at the outset to request only reasonable fees and to provide the necessary assistance to the district court for determining a reasonable fee.

Scham, 148 F.2d at 559 (quoting *Fair Housing Council v. Landow,* 999 F.2d 92, 98 (4th Cir. 1993) (J. Hamilton)). Accordingly, the Court RECOMMENDS that Plaintiff's Fee Application be DENIED in its entirety.

2. Alternative Recommendation

To provide Judge Fitzwater an alternative, however, the Court will consider the fee application in light of the traditional lodestar analysis.[3]

In the lodestar analysis, the Court calculates the lodestar fee amount "by multiplying the number of hours reasonably expended by an appropriate hourly rate in the community for such work." *Singer v. City of Waco,* 324 F.3d 813, 829 (5th Cir. 2003) (quoting *Heidtman v. County of El Paso,* 171 F.3d 1038, 1043 (5th Cir. 1999)). Once the lodestar fee amount is calculated, the Court may increase or decrease the lodestar fee amount based on the factors articulated in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974). *See Green v.*

---

[3] However, the Court will only perform the lodestar analysis with respect to attorney fees claimed by Mr. Bundren. Given the uncomplicated nature of this case, it would be unreasonable to charge Defendants for the services of more than one plaintiff's attorney. In any event, Mr. Shackelford's billing entries are too vague to ascertain his role in this case, much less the necessity of his services. Thus, the Court RECOMMENDS that all attorney fees claimed by Mr. Shackelford be DENIED.

Administrators of Tulane Educational Fund, 284 F.3d 642, 661 (5th Cir. 2002).

a. Reasonable Hours

Mr. Bundren seeks attorney fees for 2,467.45 hours of work. (P.'s App. Vol. 2 at 75-303.) Having reviewed the submissions of the Parties and the applicable legal standards, the Court concludes that Mr. Bundren's claimed hours should be reduced because he claims attorney fees for time expended on irrelevant motions and unsuccessful motion responses and because he has exercised insufficient billing judgment. The Court further concludes that Mr. Bundren's claimed hours should be reduced due to unreliable time records.

i. *Irrelevant Motions and Unsuccessful Motion Responses*

Defendants contend that Mr. Bundren should not be awarded attorney fees for time expended on motions on which Plaintiff did not prevail. (D.s' Resp. at 46-47.) As noted above, § 1988(b) provides for an award of attorney fees to prevailing parties in civil rights cases. *See* 42 U.S.C. § 1988(b). If a plaintiff brought claims or motions that he or she did not prevail upon that are separate and distinct from the claims or motions on which the plaintiff did prevail, the plaintiff is not considered a prevailing party as to those claims or motions, and the court may not award fees for the time expended on those claims or motions.

See Von Clark v. Butler, 916 F.2d 255, 258 (5th Cir. 1990). Indeed, "[a]bsent a reliable record of the time expended on the prevailing claim, it is within the discretion of the district court to determine a reasonable number of hours that should have been expended in pursuing the claim on which the party prevailed." *Id.* at 259.

In the instant case, Defendants argue that Mr. Bundren should not be awarded fees for 15 motion disputes that Plaintiff lost. These motions include the following: (1) Defendant Smith's Partial Motion to Dismiss, (2) Plaintiff's Motion for Leave to Take in Excess of Ten Depositions, (3) Defendant GISD's Motion to Quash the Deposition Notice of Cobby Caputo, (4) Plaintiff's Second Motion for Leave to Take in Excess of Ten Depositions, (5) Plaintiff's Application for TRO and Preliminary Injunction, (6) Plaintiff's Motion to Shorten Time to Respond to Plaintiff's Preliminary Injunction, (7) Defendant Smith's Motion to Extend Deadline for Designating Expert Witnesses, (8) Defendant Smith's Motion to Quash and for Protective Order, (9) Plaintiff's Opposed Motion for Leave to File Plaintiff's Second Amended Original Complaint, (10) Plaintiff's Motion to Compel Herman Smith to Answer Interrogatories, (11) Plaintiff's Opposed Motion to Enlarge Page Limitations, (12) Defendant Smith's Motion for Leave to File Two Motions for Summary Judgment, (13) Defendant Smith's Motion to Show Cause and for Sanctions, (14) Plaintiff's Motion for Sanctions against Dr. Herman Smith, and (15) Defendant

Smith's Motion to Strike Plaintiff's Expert Witness. (*See* D.s' Resp. at 46-47.) The Court notes that these motions, and the respective responses, briefs, replies, and orders relating to these motions, take up most of the Court's docket sheet from the time of filing to March 2004. The Court agrees with Defendants that Mr. Bundren should not be awarded fees for time expended on preparing or responding to these motions, as Plaintiff did not prevail on these motions. Indeed, these motions were irrelevant, doing nothing to further the claims on which Plaintiff did prevail.[4]

A review of the Fee Application, specifically the time records submitted in support of the request for fees, shows that Mr. Bundren has properly excluded some of the time expended on these motions from the total number of hours for which he is requesting fees. (*See, e.g.,* Pl.'s App. Vol. 2 at 84, 86, 87.) However, the time records also show, and the Court finds, that Mr. Bundren included some of the hours expended on these motions in his total claimed hours. (*See, e.g.,* P.'s App. Vol. 2 at 104-105, 128, 134, 138, 172, 205, 207, 208, 276, 277, 278, 281.) Because of Mr. Bundren's habit of lumping together all of the tasks performed in one day in his time records, the Court must make certain estimates and assumptions regarding the amount of time Mr. Bundren could have

---

[4] Because this case has not yet gone to trial, the Court proceeds as though the Plaintiff will prevail on all her remaining claims. Should Plaintiff not ultimately prevail on all such claims, a further reduction in attorney fees would be appropriate.

expended on the claims and motions on which Plaintiff has prevailed. *See Von Clark,* 916 F.2d at 259. After reviewing Mr. Bundren's time records, Defendants' objections, and the Court's docket sheet (taking into account the possible time spent by counsel not reflected on the docket sheet), the Court recommends that Mr. Bundren's claimed hours be reduced by one-third, *i.e.*, by 822.48 hours, for time spent on irrelevant motions and unsuccessful motion responses.

ii. *Billing Judgment*

Defendants contend that Mr. Bundren's time records are not reasonable. (D.s' Resp. at 47-48, 49, 50, 51.) The Court construes this objection as a challenge to Mr. Bundren's exercise of billing judgment. Billing judgment requires counsel to "make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary. . . ." *City of Riverside v. Rivera,* 477 U.S. 561, 570 n.4 (1986) (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983)). *See also Green v. Administrators of Tulane Educational Fund,* 284 F.3d 642, 662 (5th Cir. 2002) (describing billing judgment as "writing off unproductive, excessive, or redundant hours"). Although the Court recognizes that Mr. Bundren has demonstrated the exercise of *some* billing judgment by excluding certain hours as "DNB [Do Not Bill] Time," (*see, e.g.*, P.'s App. Vol. 2 at 175-76, 178, 259, 301), the Court finds that Mr. Bundren has failed to exercise *sufficient* billing judgment. *See Walker v. HUD,* 99 F.3d 761, 770 (5th Cir. 1996) ("The plaintiffs

are charged with the burden of showing the reasonableness of the hours they bill and, accordingly, are charged with proving that they exercised billing judgment."). Specifically, the Court finds that Mr. Bundren seeks attorney fees for hours that are unproductive, excessive, and otherwise unnecessary, including, but not limited to hours expended on: (1) his performance of more than 80 reviews of his own files; (2) his participation in nearly 300 conferences with his client; (3) his participation in nearly 200 conferences with counsel or co-counsel (not including opposing counsel); (4) his preparation of approximately 80 pieces of written correspondence to his client; (5) his preparation of nearly 60 pieces of written correspondence to counsel or co-counsel (not including opposing counsel);[5] (6) his participation in more than 90 written or verbal communications with court personnel or court reporters (not including hearings, conferences, and oral argument); (7) his preparation of nearly 40 pieces of written correspondence to unidentified recipients; (8) his performance of more than 50 instances of non-legal services, such as administrative or courier services; (9) his participation in approximately 20 conferences with legal assistants or interns; and (10) his performance of nearly 50

---

[5] The Court recognizes that some of these totals might overlap in that a single conference or piece of correspondence might have been counted twice if it included both the client and counsel or co-counsel. The Court has taken this into account in recommending an appropriate reduction in hours for insufficient billing judgment.

instances of general legal research or self-educational activities. (P.'s App. Vol. 2 at 75-303.) One particularly egregious example of a failure to exercise billing judgment is time claimed by Mr. Bundren for his travel to and from, and his attendance at, a state bar function in San Antonio where opposing counsel delivered a speech on the issue on qualified immunity. (*Id.* at 202.) Accordingly, the Court recommends that Mr. Bundren's remaining claimed hours be reduced by one-half, *i.e.*, by 822.48 hours, for failing to exercise sufficient billing judgment.

iii. *Unreliable Time Records*

With respect to the unreliability of the time records, the Court notes that the time records submitted to the Court are an altered version of the time records that had been previously submitted to Defendants. (*See generally* P.'s App. Vol. 2 at 75-303; D.s' App. Vol. 3 at 62-219.) Although Mr. Bundren has represented that the alterations reflect "billing judgment," the time records submitted to the Court do not indicate where text has been redacted from a description of services, nor do they indicate the corresponding reduction in the number of claimed hours. (*Compare, e.g.*, D.s' App. Vol. 3 at 131-32 (Aug. 6, 2001) *with* P.'s App. Vol. 2 at 150 (Aug. 6, 2001). *See also* D.s' App. Vol. 2 at 116-20.) If this were intended to be an exercise of "billing judgment," as opposed to

purposeful concealment,[6] the Court questions why Mr. Bundren did not designate these hours as "DNB [Do Not Bill] Time" consistent with his other exercises of billing judgment. (*See, e.g.*, P.'s App. Vol. 2 at 175-76, 178, 259, 301.) This concern appears to be indicative of a larger problem, *i.e.*, that the time records submitted to the Court are not contemporaneous time records. This conclusion is further evidenced by the fact that Mr. Bundren and Mr. Shackelford do not practice law together, yet they have submitted only one set of time records to the Court encompassing both of their claimed hours and rates. (P.'s App. Vol. 2 at 75-303.) Thus, the Court is concerned about the reliability of the time records submitted to the Court and therefore recommends that Mr. Bundren's remaining claimed hours be reduced by one-third, *i.e.*, 274.16 by [sic] hours.

Accordingly, the Court recommends that Mr. Bundren be permitted to claim 548.33 hours for his work in this case (2,467.45 - 822.48 - 822.48 - 274.16 = 548.33).

---

[6] The time records submitted to Defendants indicate that, during one 34-day period in July and August 2001, Mr. Bundren claimed an average of 14.17 hours billed per day on this case. (*See* D.s' App. Vol. 3 at 117-32; D.s' App. Vol. 2 at 112-13.) The time records submitted to the Court indicate that, during the same 34-day period in July and August 2001, Mr. Bundren claimed an average of 5.36 hours worked per day. (P.'s App. Vol. 2 at 142-50, 202, 281-86.)

b. Reasonable Hourly Rate

After conducting a review of the reasonable number of hours expended on the litigation, the Court must set a reasonable hourly rate. *See League of United Latin American Citizens #4552 (LULAC) v. Roscoe Indep. Sch. Dist.,* 119 F.3d 1228, 1234 (5th Cir. 1997). This rate must be based on the prevailing market rates in the relevant legal market, "not the rates that lions at the bar may command." *Hopwood v. Texas,* 236 F.3d 256, 281 (5th Cir. 2000) (internal quotations omitted). "The hourly fee awarded must be supported by the record. . . ." *LULAC,* 119 F.3d at 1234.

In the instant case, Mr. Bundren contends that his current hourly rate is $450 per hour. Mr. Bundren provides two affidavits in support of this hourly rate. Robert T. Mowrey, a partner in the Dallas office of the law firm of Locke, Liddel & Sapp, L.L.P., testifies that $450 per hour for Mr. Bundren is the prevailing market rate for legal services performed in *complex* federal litigation by attorneys with Mr. Bundren's qualifications. (P.'s App. Vol. 1, Ex. 5 at 2-3.) Mr. Bundren also provides the affidavit of David J. LaBrec, a partner in the Dallas office of the law firm of Strasburger & Price, who testifies that the rate requested by Mr. Bundren is within the range for *complex* civil rights litigation in Dallas. (P.'s App. Vol. 1, Ex. 6 at 68-72.) As discussed above, the Court is of the opinion that the instant case is not complex.

Defendants object to the hourly rate claimed by Mr. Bundren. (D.s' Resp. at 18-32.) Defendants argue that the affidavits of Mr. Mowrey and Mr. LaBrec should be disregarded by the Court. They argue that Mr. Mowrey is exclusively a commercial litigator and that Mr. LaBrec does not handle civil rights cases for plaintiffs. (*Id.* at 20-21.) Defendants also argue that Mr. Bundren has never received his claimed historic rates in a civil rights case and that his claimed rates "are self-serving, and . . . devoid of any concern for what a responsible, fee paying client would accept." (D.s' Resp. at 21.) Defendants submit evidence that Mr. Bundren has never "received [his] claimed hourly rates in a civil rights case from a regular fee paying client nor [has he] ever received [his] claimed hourly rate[ ] from a court order." (D.s' App. Vol. 6 at 72-88.) Defendants also submit evidence that defense attorneys in civil rights cases generally charge only $120 to $150 per hour. (*See* D.s' App. Vol. 1 at 9-13.)

Additionally, Defendants submit an affidavit from Edward Cloutman, a well-known and highly respected Dallas attorney who represents plaintiffs in civil rights and labor and employment actions. Mr. Cloutman testifies that, in his experience, "the range for persons with twenty to thirty years experience varies somewhat, but the range is between two hundred fifty dollars . . . and three hundred fifty dollars per hour." (D.s' App. Vol. 1 at 3.) Mr. Cloutman acknowledges that the rates will vary depending on the complexity of the case and the degree of recovery obtained. (*Id.*) Finally, Mr. Cloutman testifies that he

believes that the instant case was not complex and that the hourly rate should be set somewhere in the middle of the range. (*Id.*)

The Court finds Mr. Cloutman's affidavit and Defendants' arguments persuasive. For the reasons discussed above, the Court finds that the hourly rate sought by Mr. Bundren is not justified. Due to the lack of complexity, the lack of evidence justifying a higher rate, the absence of any novel issues, the quality of Plaintiff's pleadings, and the amount of damages at issue, the Court finds that an hourly rate of $200 is reasonable – and even generous – for Mr. Bundren in this case.

For the foregoing reasons, the Court RECOMMENDS that Mr. Bundren's lodestar fee amount be $109,666 (548.33 hours x $200 per hour).

c. *Johnson* Factors

Once the Court has calculated the lodestar fee amount, the Court may increase or decrease the lodestar fee amount based on the twelve factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). *See Green v. Administrators of Tulane Educational Fund*, 284 F.3d 642, 661 (5th Cir. 2002). The twelve *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the

fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). The Court recommends that no adjustment be made to the lodestar fee amount because the Court has already considered the applicable *Johnson* factors in calculating the lodestar fee amount.

B. *Costs and Expenses*

As noted above, Plaintiff's counsel seek $113,843.78 in costs and expenses. (P.'s 1st Am. Fee App. at 2-3 & Ex. 1.) Among other examples, Plaintiff's counsel request: (1) $1 per mile for driving expenses; (2) $22,619.62 for document production; (3) $24,429.55 for copying and duplication; and (4) $12,286.05 for faxing. (*Id.* at Ex. 1.) Plaintiff's counsel fail to submit any invoices or receipts to corroborate their claimed costs and expenses, which seem excessive and of questionable validity.[7] Because the

[7] A computer-generated "slip report" is the only evidence submitted by Plaintiff's counsel in support of their claimed costs and expenses. (P.'s App. Vol. 3 at 305-549.) The "slip report" fails to include the date on which each cost and expense accrued and is devoid of even the most basic information about the nature of each cost and expense. (*Id.*)

Court has insufficient information to make a precise recommendation as to costs and expenses, the Court reserves the issue for Judge Fitzwater's determination, noting only that a substantial reduction seems in order.

III. Conclusion

For the foregoing reasons, the Court RECOMMENDS (1) that Plaintiff's Fee Application be DENIED in its entirety as to attorney fees or (2) in the alternative, that Mr. Bundren be awarded $109,666 in attorney fees and that Mr. Shackelford not be awarded any attorney fees. The Court reserves for Judge Fitzwater the final determination as to the requested costs and expenses. Finally, any relief not expressly recommended herein should be denied.

SO RECOMMENDED.

DATED: July 27, 2004.

/s/ Barefoot Sanders
BAREFOOT SANDERS,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT
OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW, Plaintiff, VS. GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al., Defendants.	§ § § § § § § § §	Civil Action No. 3:00-CV-0913-D

ORDER

(Filed Jun. 4, 2004)

The court refers to Judge Barefoot Sanders for arbitration the parties' attorney's fees dispute in this case. He may conduct such proceedings as he deems necessary to arbitrate the dispute.

SO ORDERED.

June 4, 2004.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW,	§	
Plaintiff,	§	
	§	
VS.	§	Civil Action No.
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al.,	§	3:00-CV-0913-D
	§	
Defendants.	§	

ORDER

(Filed Mar. 8, 2004)

This case is pending before United States District Judge Sidney A. Fitzwater who has requested the undersigned Judge Barefoot Sanders to review attorney fees and expenses incurred by Plaintiff to date.

This Court held a conference with counsel for all parties on February 25, 2004. After discussion with counsel, the Court sets the following schedule. Plaintiff is directed to submit to Judge Sanders evidence and information of expenses incurred and counsel's reasonable hourly rates and time records, broken down to reflect the time expended on each Defendant, no later than ***noon, March 29, 2004***. Such submission shall be in the form of an affidavit and shall also include the legal authority upon which Plaintiff relies for reimbursement with a brief (capsule) statement of the holding of each such case.

Defendants must respond to Plaintiff's submission by ***noon, May 3, 2004***. Such response must be in the form of an affidavit detailing the items as to which Defendants disagree, including the amount of time spent, the purpose for which time was spent, and the rate charged per hour.

Judge Sanders will consider the submission and call counsel for a conference when and if necessary. Judge Sanders will make his ruling known to counsel either by written memorandum or by memorandum dictated into the record with a court reporter present.

It is anticipated that Judge Sanders' ruling will be the basis for good faith settlement discussions of all matters in the case. Pending Judge Sanders' review of the above requested submissions, all matters in this case are **STAYED.**

SO ORDERED.

DATED: March 8, 2004.

/s/ Barefoot Sanders
BAREFOOT SANDERS,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT
OF TEXAS

Herman Smith, Petitioner v. Karen Jo Barrow.

No. 03-499.

SUPREME COURT OF THE UNITED STATES

540 U.S. 1005; 124 S. Ct. 547; 157 L. Ed. 2d 411; 2003 U.S. LEXIS 8233; 72 U.S.L.W. 3327; 20 I.E.R. Cas. (BNA) 960

November 10, 2003, Decided

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10351

D.C. Docket No. 3:00-CV-913-D

KAREN JO BARROW

Plaintiff-Appellant

v.

GREENVILLE INDEPENDENT SCHOOL DISTRICT; ET AL

Defendants

HERMAN SMITH, DR

Defendants-Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas.

Before KING, Chief Judge, REAVLEY and STEWART, Circuit Judges.

JUDGMENT

(Filed Jun. 2, 2003)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is reversed, and the cause is remanded

to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: Jul. 10, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10351

KAREN JO BARROW

Plaintiff-Appellant

v.

GREENVILLE INDEPENDENT
SCHOOL DISTRICT; ET AL

Defendants

HERMAN SMITH, DR

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Filed July 02, 2003)

(Opinion 6/2/03, 5 Cir., ___, ___ F.3d ___)

Before KING, Chief Judge, REAVLEY and STEWART, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ Thomas M. Reavley
United States Circuit Judge

REVISED JUNE 17, 2003

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02-10351

KAREN JO BARROW,

Plaintiff-Appellant,

versus

GREENVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants,

HERMAN SMITH, DR.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(Filed June 2, 2003)

Before KING, Chief Judge, and REAVLEY and STEWART, Circuit Judges.

REAVLEY, Circuit Judge:

Karen Jo Barrow claims that she was denied a public-school position because her children attended private school, an alleged violation of her constitutional right to educate her children in private school. The district court rendered summary judgment for the

school superintendent, Dr. Herman Smith, on the ground of qualified immunity, and certified it as final.[1] We reverse.

BACKGROUND

Barrow was a classroom teacher within the Greenville Independent School District in July 1998 when she learned of an opening at the district's middle school for the position of assistant principal. Barrow expressed her interest in the position, but was advised that to be considered for it she had to re-enroll her children in a public school. Barrow and her husband met with Smith, then district superintendent, who told them that the district required that the children of all principals and administrators attend public school. Barrow refused to comply with the district's policy, and as a result, the district did not consider her for the position of assistant principal.

Barrow initiated the instant action against the district and Smith under 42 U.S.C. § 1983. Smith moved for summary judgment asserting qualified immunity, allowing the court to assume for that limited purpose that he decided not to promote Barrow in part because she chose to educate her children in a private school. The district court determined that Barrow had failed to allege the violation of a clearly established constitutional right in 1998 and that Smith was therefore entitled to qualified immunity.

---

[1] *See* FED. R. CIV. P. 54(b).

DISCUSSION

Whether a public official is entitled to qualified immunity requires that the court pass on two questions.[2] First, viewing the facts in a light most favorable to the plaintiff, the court must determine if the plaintiff has alleged the violation of a constitutional right.[3] The second question (which we need address only if we answer the first question in the affirmative) requires the court to determine if the constitutional right was clearly established when the violation supposedly occurred.[4] The right can be said to have been clearly established only if all reasonable officials in the defendant's position would have concluded that the challenged state action was unconstitutional.[5]

In her amended complaint, Barrow argued that Smith violated her right to select a private-school education for her children as guaranteed by the First

---

[2] Smith argues that even if we reverse the district court's determination that he is entitled to qualified immunity this court can affirm the judgment below by finding that Barrow would not have received the assistant principal position anyway. He argues (1) that Barrow failed to complete a required written application for the position and (2) that the qualifications of other candidates were superior to Barrow's. Never having reached the merits of Barrow's claims, the district court of course did not address these arguments. On this record we cannot rule on these issues as a matter of law.

[3] *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

[4] *See id.*

[5] *See Cozzo v. Tangipahoa Parish Council*, 279 F.3d 273, 284 (5th Cir. 2002).

Amendment and "the penumbra of familial privacy rights" (count I); her right under the Due Process Clause of the Fourteenth Amendment to direct the upbringing of her children (count II); and her right under the Free Exercise Clause of the First Amendment to provide a religious education for her children (count III). We will consider these three claims together: at bottom all aver that Barrow, a public-school employee, has a constitutionally-protected right to select a private-school education for her children. Our inquiry at this stage is limited to the question whether there is a recognized constitutional right and not whether that right is grounded in the First Amendment, the Fourteenth Amendment, or both.

Twenty years ago, in *Brantley v. Surles*,[6] we said that "[t]he parental interest in the direction and control of a child's education is central to the family's constitutionally protected privacy rights."[7] We also recognized that constitutional rights take on a different hue in the context of public-school employment in light of the state's interest "in promoting efficiency in the educational services which it provides through its school

---

[6] 718 F.2d 1354 (5th Cir. 1983).

[7] *Id.* at 1358 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Soc. of Sisters*, 268 U.S. 510 (1925)). In *Meyer*, the Court recognized that parents have a protected liberty interest in the upbringing of their children under the Due Process Clause of the Fourteenth Amendment. 262 U.S. at 399-400. In *Pierce*, the Court held that the liberty interest described in *Meyer* protected the choice of parents to enroll their children in private school. 268 U.S. at 534-35.

employees."[8] Thus, the state may restrict its employee's constitutionally-protected conduct "whenever that conduct materially and substantially impedes the operation or effectiveness of the [state's] educational program."[9] The question presented in *Brantley* was whether a Mississippi school district superintendent could lawfully terminate Brantley, an elementary-school cafeteria manager, who decided to transfer her son to a segregated private school. Brantley was white and worked in a predominately black public school. The superintendent testified that interracial dissension "might" occur if Brantley's son continued to attend the segregated private school.[10] We rejected this justification for terminating Brantley, concluding that it "was unsupported by any objective evidence."[11]

Several years later we decided *Fyfe v. Curlee*.[12] The plaintiff in that case, a secretary to a school principal, also decided to enroll her daughter in a segregated private school. As a result, the school superintendent transferred her to a menial position with no responsibility. Relying on *Brantley*, we affirmed that the *Fyfe* plaintiff had a protected right to select a private-school education for her child "under

---

[8] *Id.* at 1359.

[9] *Id.*

[10] 765 F.2d 478, 480 (5th Cir. 1985) (appeal following remand).

[11] *Id.*; *cf. Stough v. Crenshaw County Bd. of Educ.*, 744 F.2d 1479 (11th Cir. 1984).

[12] 902 F.2d 401 (5th Cir. 1990).

the First Amendment and the penumbra of familial privacy rights recognized by the Supreme Court."[13] In *Fyfe,* black families threatened to boycott businesses in the town in which the school district was located unless the district promised to not hire anyone whose children attended a segregated private school. However, the school district offered no evidence of a causal link between the threatened boycott and Fyfe's daughter's attendance of the private school. In the absence of evidence that Fyfe's choice of a private-school education for her daughter would substantially and materially interfere with the school district's operations and effectiveness we held that Fyfe must prevail as a matter of law.[14]

Our decisions in *Brantley* and *Fyfe* leave no doubt that public-school employees like Barrow have a protected right to educate their children in private school. The state cannot take an adverse employment action against a public-school employee for exercising this right unless it can prove that the employee's selection of private school materially and substantially affects the state's educational mission. In this case, for purposes of this decision, Smith refused to consider Barrow for the position of assistant principal because her children attended private school. Refusal to promote is an adverse employment action.[15] Because

---

[13] *Id.* at 403.

[14] *Id.* at 405-06.

[15] *See Harrington v. Harris,* 118 F.3d 359, 365 (5th Cir. 1997).

Smith failed to present a fact issue that Barrow's children's attendance of a private school would negatively impair district operations were Barrow selected for assistant principal, the violation of a constitutional right is shown.

Brantley and *Fyfe* also confirm that the constitutional right of public-school employees to select a private-school education for their children was clearly established when Smith refused to consider Barrow for the position of assistant principal. Smith argues that *Brantley* and *Fyfe* do not give fair warning to all reasonable officials in his place that refusing to consider Barrow for the assistant principal position would be unconstitutional. Initially, we note that the question whether there was a clearly-established right does not turn on the existence of a court decision determining that conduct identical to that which is at issue here is unlawful.[16] Rather, the pertinent inquiry asks "whether the state of the law [in 1998] gave [Smith] fair warning that [his] alleged treatment of [Barrow] was unconstitutional."[17] Smith points out that the plaintiff-school employees in *Brantley* and *Fyfe* were in non-administrative positions, whereas Barrow sought the position of assistant principal. He suggests that requiring administrative employees to enroll their children in public schools better serves the district's interest in public confidence in the public

---

[16] *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

[17] *See Hope v. Pelzer*, 122 S. Ct. 2508, 2516 (2002).

school system than imposing a similar requirement on non-administrative employees does. Smith may be correct that the public tends to be more attuned to the personal educational decisions of the school district's administrative employees than of its other employees. We may also assume that the district's interest in public confidence in its schools is both legitimate and important.[18] However, our decisions in *Brantley* and *Fyfe* did not rest on a too-attenuated nexus between the public confidence in public schools and the personal educational choices of cafeteria managers and secretaries. Instead, those decisions rely on our recognition that (1) public-school employees enjoy a protected right to enroll their children in private school, and (2) a state action that interferes with this protected right is unsustainable unless proved to further a state interest. *Brantley* and *Fyfe* require the state to prove that a state action that interferes with

---

[18] Indeed, in some instances, the success of a public education program may depend on the perception that it is superior to that of both other public schools and private schools. *See Zelman v. Simmons-Harris,* 122 S. Ct. 2460 (2002) (upholding a state law authorizing parents to assign tax dollars to another public school or to a private school upon their decision not to enroll their children in the schools of the public-school district in which they reside). Further, it is conceivable, as Smith suggests, that the public might interpret the decision of one or more senior public-school employees to enroll their children in a private school as a vote of no-confidence in [sic] school district in which they work. The burden of the school district would then be to prove that the private school placement materially and substantially impeded the operation and the effectiveness of the state's educational program.

protected educational choices of its public-school employees furthers the state's interest in the efficient operation of its schools. Nothing about those two decisions suggests that the state can forgo this burden with respect to its more senior employees.[19] We therefore hold that no reasonable official could conclude that the application of the school district's public-school patronage policy to Barrow was constitutional.[20]

REVERSED and REMANDED.

---

[19] In support of his claim that the right of public-school employees to enroll their children in private school is not clearly established, Smith offered the testimony of several professional educators, all of whom opined that patronage policies like the one in this case are lawful or are of uncertain legality. The question whether an asserted constitutional right is clearly established is one of law. Smith's subjective reasonableness has no place in our inquiry.

[20] In so holding, we express no opinion on the particular degree of scrutiny a state action must undergo to withstand a challenge to its constitutionality in a case like this one. Instead, we simply recognize that the state cannot strip its school employees of the right to choose a private-school education for their children without proving that the unfettered exercise of this right will undermine a state interest. Barrow and amici curiae argue that any state action that interferes with this right is subject to strict scrutiny. We need not take up this question today. In the absence of objective proof that Barrow's choice of a private-school education for her children will undermine a state interest the district's patronage policy fails irrespective of the degree of scrutiny applied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	Civil Action No.
	§	3:00-CV-0913-D
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al.,	§	
	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Apr. 18, 2002)

Plaintiff Karen Jo Barrow ("Barrow") sues defendant Greenville Independent School District ("GISD") under 42 U.S.C. § 1983 alleging violations of federal constitutional rights and of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* She also brings causes of action arising under Title V of the Texas Civil Practice and Remedies Code and Article I, § 6 of the Texas Constitution. Barrow asserts that the GISD Superintendent of Schools refused to consider her for the position of middle school Assistant Principal unless she placed her children – who attended a private Christian school – in public school. On GISD's motion for summary judgment, the court holds that Barrow has raised a genuine issue of material fact concerning whether GISD deprived her of federal rights under a custom and practice and declines to dismiss her § 1983 claims. The court holds that GISD

is entitled to summary judgment dismissing her Title VII cause of action except to the extent she asserts a reasonable accommodation claim. The court dismisses Barrow's state-law claim for injunctive relief but otherwise denies the part of GISD's motion that pertains to her state-law causes of action.

I

During the period relevant to this lawsuit, Barrow was a classroom teacher employed by GISD who was eligible and qualified to hold the position of Assistant Principal. Her school age children were students at the Greenville Christian School, a private religious school. Barrow alleges that her federal constitutional rights were violated when Dr. Herman Smith ("Dr. Smith"), then the GISD Superintendent, refused to consider, interview, or recommend her to the GISD Board of Education for a school administrator position unless she enrolled her children in public school.[1] In her first amended original complaint ("amended complaint"), Barrow alleges that GISD abridged the following federal constitutional rights: (1) the right under the First and Fourteenth Amendments to protection of family relationships, the right to

---

[1] Barrow alleges that she was informed that "she would be required to remove her children from their private Christian education and to place them in a public school education within the independent school district where she resided." P. Am. Compl. at ¶ 6.29; *see id.* ¶ 6.32 ("in either the [GISD] or another independent school district but not in private education").

direct one's children's educations, and the right of familial privacy (count I); (2) the liberty interest and due process right under the Fourteenth Amendment Due Process Clause to make decisions concerning familial relationships and practices, including the direction and control of one's children's education (count II); and (3) the right under the First Amendment Free Exercise Clause to the free exercise of one's religious faith by choosing to educate one's children in a religious educational institution according to that faith (count III). Barrow additionally asserts that she suffered an adverse employment action because of religious discrimination, in violation of Title VII (count V).

II

The court first considers whether GISD can be held liable under § 1983 for alleged violations of Barrow's constitutional rights. Barrow asserts that Dr. Smith stated that he would not consider her for promotion to an administrative position with GISD if she chose to educate her school-age children in a private school. She alleges that Dr. Smith employed this criterion with regularity in determining whom to interview, and whom to recommend, for available GISD administrative positions. Barrow also contends that for, purposes of assessing § 1983 liability against GISD under *Monell v. Department of Social Services*, 436 U.S. 658, 689 (1978), Dr. Smith was a policymaker with respect to decisions concerning whom to

hire or whom to interview for administrative positions.

A

A governmental entity such as GISD can be sued and subjected to monetary damages and injunctive relief under 42 U.S.C. § 1983 only if its official policy or custom causes a person to be deprived of a federally protected right. *See Board of County Comm'rs of Bryan County, Okla. v. Brown,* 520 U.S. 397,403 (1997); *Monell,* 436 U.S. at 694. A governmental entity cannot be liable for civil rights violations under a theory of *respondeat superior* or vicarious liability. *See Monell,* 436 U.S. at 694; *see also Baskin v. Parker,* 602 F.2d 1205, 1208 (5th Cir.1979). Official policy is defined as:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the [district] . . . or by an official to whom the [district] ha[s] delegated policy-making authority; or
>
> 2. A persistent, widespread practice of [district] officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents [district] policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the district or to an official to whom that body had delegated policy-making authority.

Eugene v. Alief Indep. Sch. Dist., 65 F.3d 1299, 1304 (5th Cir.1995) (alterations in original) (citing *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir.1992)); *see also Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir.1984) (en banc) (per curiam).

A plaintiff must identify the purported policy said to constitute a violation of her rights, show that the policy is attributable to the governmental entity itself, and establish that she incurred her injury because of the application of that specific policy. *See Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. 1984) (en banc). She must demonstrate that the governmental entity, through its deliberate conduct, was the moving force behind the injury or harm suffered, and she must establish a direct causal link between the governmental entity's action and the deprivation of a federally protected right. *Bryan County*, 520 U.S. at 403-04.

Liability must rest on official policy, meaning the governmental entity's policy, not the policy of an individual official. *Bennett*, 728 F.2d at 769. The official complained of must possess

> final authority to establish [school district] policy with respect to the action ordered. . . . The official must also be responsible for establishing final government policy respecting such activity before the [school district] can be held liable. . . . [W]hether an official had final policymaking authority is a question of state law.

Pembaur v. City of Cincinnati, 475 U.S. 469, 481-82 (1986).

Under Texas law, the final policymaking authority in an independent school district rests with the district's trustees. *See Jett v. Dallas Indep. Sch. Dist.,* 7 F.3d 1241, 1245 (5th Cir.1993). An employee, agency, or board of a governmental entity is not a policymaker unless the governmental entity, through its lawmakers, has delegated exclusive policymaking authority to that employee, agency, or board and cannot review the action or decision of the employee, agency, or board. *See City of St. Louis v. Praprotnik,* 485 U.S. 112, 130 (1988); *Worsham v. City of Pasadena,* 881 F.2d 1336, 1340-41 (5th Cir.1989). In *Jett* the Fifth Circuit held that, under the Texas Education Code, the School Board, rather than the Superintendent, is the policymaking authority for the school district absent specific contrary arrangements. *See Jett,* 7 F.3d at 1245.

Although in her brief she intermixes and repeats several arguments to contend that Dr. Smith is a final policymaker whose decision is attributable to GISD, *see* P. Br. at 6-16, Barrow appears to advance reasoning that can be grouped and addressed in these three parts: (1) Dr. Smith was a final policymaker in July 1998 with respect to the hiring process for new administrators for GISD, under Tex. Educ. Code Ann. § 11.201(d)(3) (Vernon Supp. 2002); (2) the GISD Board merely rubber-stamped his recommendations, its power was limited merely to accepting or rejecting such recommendations, and it was no more than the

titular decisionmaker; and (3) Dr. Smith's edicts and acts were final decisions of GISD because, although the Board retained the authority to create the position of Assistant Principal, it delegated to the Superintendent alone the final authority to select the person who would fill it. Barrow also argues that, even if Dr. Smith is not deemed a final policymaker, GISD is nevertheless liable under § 1983 because (1) the allegedly discriminatory acts occurred pursuant to "a persistent, widespread practice" of GISD employees, including Dr. Smith; and (2) because the GISD Board exhibited a "deliberate indifference" to Barrow's constitutional rights by *inter alia* failing to properly train and supervise Dr. Smith in the protection of these rights.

B

In advancing the argument that Dr. Smith functioned as a final policymaker in his capacity as GISD Superintendent, Barrow argues that the Fifth Circuit's holding in *Jett* does not apply to this case, in part because of subsequent changes to the Texas Education Code. *See* P. Br. at 25-27. After examining the present statutory scheme governing school district management, including Tex. Educ. Code Ann. § 11.201(d)(3) (Vernon Supp. 2002), the court concludes that *Jett's* result also applies to the present case, even under the revised Texas Education Code. The court agrees with Judge Lindsay's decision in *Texas State Teachers Ass'n v. Mesquite Independent School District,* 2001 WL 1029514, at *3 (N.D. Tex.

Aug. 23, 2001) (Lindsay, J.), that "[t]]he determination in *Jett* that the Board is the final policymaking authority was based on a number of provisions in the Education Code. There have been changes since the events at issue in *Jett,* but not so significant as to change the conclusion."[2] Applying reasoning similar to that followed in *Texas State Teachers Ass'n,* the court holds that, under the revised Texas Education Code, the GISD Board – not the Superintendent – establishes policy concerning the eligibility requirements for a person to be interviewed for an administrator position. In fact, the summary judgment record indicates that the GISD Board considered an official policy requiring that applicants enroll their school-age children in the GISD, but ultimately decided against adopting such a policy. *See* D. App. 327-28, 330-37.

Given the Texas statutory scheme, Dr. Smith may be deemed a policymaker only if the Board had specifically delegated authority to him, the exercise of which was final and not subject to Board review. *See Worsham,* 881 F.2d at 1340-41. Based on the record evidence, the court concludes as a matter of law[3] that the GISD did not delegate such final policymaking authority to Dr. Smith.

---

[2] For an elaboration of the reasoning behind this conclusion, see *Texas State Teachers Ass'n,* 2001 WL 1029514 at *3-*4.

[3] *See Gros v. City of Grand Prairie, Tex.*, 181 F.3d 613, 616-17 (5th Cir. 1999).

Barrow's evidence that the Board "rubber stamped" job applicants recommended by the Superintendent, *see, e.g.,* P. App. 2897-2945,[4] does not establish such a delegation. "Except perhaps as a step towards overruling *Monell* and adopting the doctrine of *respondeat superior,* ad hoc searches for officials possessing such '*de facto*' authority would serve primarily to foster needless unpredictability in the application of § 1983." *Jett,* 7 F.3d at 1247 n.10 (quoting *Praprotnik,* 485 U.S. at 129). The court notes that many cases that Barrow cites in support of her contention that GISD may be held liable for Dr. Smith's actions because of its history of "rubber stamping" his employment recommendations deal with the standard for assessing liability under Title VII or the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq. See* P. Br. 9-12 (citing *Rios v. Rossotti,* 252 F.3d 375, 382 (2001); *Russell v. McKinney Hosp. Venture,* 235 F.3d 219, 225 (2000)). Although, as Barrow argues, Dr. Smith may have been the *de facto* decisionmaker regarding which candidates were selected to be interviewed for GISD administrative positions, this practical circumstance does not elevate him to the status of policymaker for purposes of

---

[4] In her brief, Barrow cites over 1200 pages of the record in support of this assertion, *see* P. Br. at 15 (citing P. App. 1070-1572, 2144-2896, 2897-2945), in violation of N.D. Tex. Civ. R. 56.5(c). *See Andrews v. Comp USA, Inc.,* 2002 WL 265089, at *3 (N.D. Tex. Feb. 21) (Fitzwater, J.), *appeal docketed,* No. 02-10364 (5th Cir. Mar. 26, 2002), and discussion *infra.*

assessing liability under § 1983. As the Fifth Circuit stated in *Jett*:

> [T]hat Superintendent Wright may have been delegated the final decision in the cases of protested individual employee transfers does not mean that he had or had been delegated the status of policymaker, much less final policymaker, respecting employee transfers. In *Pembaur* and *Praprotnik* the Court carefully distinguished between those having mere *decisionmaking* authority and those having *policymaking* authority. . . . "'The fact that a particular official – even a policymaking official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.'"

Jett, 7 F.3d at 1246-47 (quoting *Pembauer*, 475 U.S. at 481-82). Texas law and the facts present in the record conclusively indicate that, here, with respect to deciding which candidates to interview, Dr. Smith functioned as a decisionmaker rather than as a policymaker. Consequently, the court holds that Dr. Smith's edicts and acts of which Barrow complains did not constitute final policy of the GISD pursuant to a delegation of authority or otherwise.

C

Although Dr. Smith did not function as a policymaker, Barrow may continue with her § 1983 action against GISD if the summary judgment evidence

raises a genuine issue of material fact concerning whether it was a "custom or practice" within the GISD to exclude from promotion to administrator any applicant who chose to educate her children in a private school.[5] She must raise a genuine issue of material fact concerning the presence of "[a] persistent, widespread practice of [district] officials or employees, which, although not authorized by officially adopted and

---

[5] Barrow makes one argument in her brief that reflects a misunderstanding of the parties' summary judgment burdens. She contends "[t]he District failed to meet its stringent summary judgment requirements by proving that, as a matter of law, it did not, in July of 1998, have a custom or practice of refusing to consider or interview job applicants for administrative positions who chose religious or private education for their children." P. Br. at 17. Because Barrow will have the burden of proving at trial that she was deprived of a constitutional right pursuant to a GISD policy or custom, GISD can meet its summary judgment obligation by pointing the court to the absence of evidence to support this element of her claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once it does so, the Barrow must then go beyond her pleadings and designate specific facts showing that there is a genuine issue for trial. *See icy* at 324; *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc) (per curiam). Summary judgment is mandatory if she fails to meet this burden. *Little*, 37 F.3d at 1076. Her failure to adduce proof on any essential element of her § 1983 claim renders all other facts immaterial. *See Celotex Corp.*, 477 U.S. at 323. Accordingly, Barrow is mistaken in contending that to obtain summary judgment based on the absence of a policy or custom, it must meet the stringent summary judgment requirement of proving that, as a matter of law, it did not have one in July of 1998. Instead, it need only point the court to the absence of evidence of a policy or custom and the burden shifts to Barrow to introduce evidence that would permit a reasonable trier of fact to find in her favor on this element of her claim.

promulgated policy, is so common and well settled as to constitute a custom that fairly represents [district] policy." *Eugene,* 65 F. 3d at 1304 (alterations in original).

1

Barrow makes the conclusory assertion that "[t]he evidence of the District's custom or practice is established by the testimony of many of the Board members and administrators who have explained the bias and prejudice that the District has toward[ ] applicants for administrative positions who choose to educate their children in religious or private schools instead of the District's public schools." P. Br. at 17. This contention is followed by a string citation to five segments of the record, encompassing 1,828 pages. The balance of the argument cites "*Id.*" once, cites four other parts of the record in groups of 11, 42, 87, and 72 pages, and does not otherwise cite the record. *See* P. Br. at 17-18. GISD has objected to global citations contained within Barrow's brief as placing an unreasonable burden on it and the court in evaluating Barrow's argument. *See* D. Rep. Br. at 8. Even excluding the citation to pages 116-1690 of the record – which is probably a typographical error[6] – the citation directs the court to review 253 pages of the

[6] In the course of making its objection, GISD explicitly notified Barrow of the likelihood of her typographical error. *See id.* Barrow has not made any attempt to clarify the citation in question.

record, including the entirety of three depositions and of Barrow's personal affidavit. Even taking into account the broad scope of the matter that Barrow is attempting to prove, this far-reaching citation nevertheless clearly violates settled summary judgment jurisprudence and this court's local civil rules. This court is not required to "comb the record" in search of a genuine issue of material fact. "Rule 56 does not impose a duty on the district court to sift through the record in search of evidence to support a party's opposition to summary judgment." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463 (5th Cir.1996) (citing *Jones v. Sheehan, Young & Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir.1996)). "Rule 56, therefore, saddles the non-movant with the duty to 'designate' the specific facts in the record that create genuine issues precluding summary judgment, and does not impose upon the district court a duty to survey the entire record in search of evidence to support a non-movant's opposition." *Jones*, 82 F.3d at 1338. N.D. Tex. Civ. R. 56.5(c) requires "[a] party whose . . . response is accompanied by an appendix [to] include in [her] brief citations to each page of the appendix that supports each assertion that the party makes concerning the summary judgment evidence." To the extent the court has inquired into the parts of the record that Barrow has cited, the court agrees with GISD's summary of the evidence, *see* D. Rep. Br. at 8, and holds that the proof is insufficient to raise a genuine issue of material fact concerning the custom or practice of GISD.

2

Barrow also argues that the GISD Board took no action on learning that she had been subjected to religious discrimination, and thus was "deliberately indifferent" to the alleged constitutional violations that Dr. Smith implemented. *See* P. Br. at 20-23.[7] She states that within days of learning that GISD had hired another person as Assistant Principal, she contacted a majority of the School Board members and informed them what Dr. Smith had said about District custom and policy of refusing to interview administrator applicants whose children were not enrolled in the District's schools and what he had done to discriminate against her. *See* P. Br. at 21 (citing P. App. 2952-2958). She contends that a majority of the Board knew that Dr. Smith had told her she was not considered for the position of Assistant Principal because she educated her children at Greenville Christian School and that she would have no future as a District administrator while she continued to educate them there instead of the GISD

---

[7] Barrow's briefing on this point includes several citations that violate Rule 56.5(c). Despite this briefing error, she has properly designated sufficient record evidence to raise a genuine issue of material fact regarding deliberate indifference. The court need not, therefore, address the other arguments on which she relies to establish that her constitutional rights were violated pursuant to a GISD custom or practice. *See id.* at 18-19. Nor, for the same reason, must it address her argument that, even if summary judgment is granted with respect to a damages claim under § 1983, her suit for prospective declaratory and injunctive relief is entitled to proceed. *See id.* at 23-25.

public schools. In support of this contention, she has adduced evidence that she spoke personally with Board President LaDayne Wilson and with Board members Randy Tarpley, Kevin Green, Steven Mitchell, and Janie Busby and informed them of Dr. Smith's alleged acts of discrimination. *See* P. App. 2952-54. Based on these contacts, Barrow argues that a majority of the Board was on notice of the Superintendent's interpretation of the District's policies, customs, and practices. Barrow argues that, afterwards, her counsel advised each Board member that she had been subjected to religious discrimination, the District employed counsel to investigate her claims, and the Board responded by doing nothing. *See id.* at 2954, 741-50. She cites the Board's response to the inquiry from the Equal Employment Opportunity Commission in which it said that one factor that would be considered in interviewing her was where she chose to educate her children. *See* P. App. 852. Barrow maintains that, even after District personnel gave sworn testimony concerning Dr. Smith's actions, the Board did nothing, and that it has not repudiated his conduct and statements, disciplined him for his actions and conduct toward Barrow, or modified its policies or adopted a policy that would prohibit such discrimination, as of the date she filed her summary judgment response.

The Fifth Circuit has held that where the final policy making body of a governmental entity acquires actual knowledge of an allegedly unconstitutional custom practiced by an employee, such knowledge

may form the basis for § 1983 liability. "Actual knowledge may be shown by such means as discussion at council meetings or receipt of written information." *Bennett,* 728 F.2d at 768. Barrow has adduced evidence of written and oral communications with Board members sufficient to support a reasonable finding that the Board had actual knowledge of Dr. Smith's conduct and rationale that Barrow challenges as unconstitutional. She has produced evidence that is sufficient to raise a genuine issue of material fact concerning whether the alleged constitutional violations occurred pursuant to a custom or practice of GISD.[8] The court therefore denies GISD's motion for

---

[8] In a related argument, Barrow asserts that the Board's failure to take action following notice of Dr. Smith's failure to promote her subjects GISD to liability for Dr. Smith's allegedly unconstitutional acts based on a "failure to train" theory. *See* P. Br. at 47-48. Barrow contends first that "[t]he district failed to move for summary judgment on Barrow's Fourteenth Amendment 'deliberate indifference' claim[.]" *Id.*, at 47. The court disagrees. GISD's motion and brief clearly indicate that GISD has moved for summary judgment on all claims asserted under § 1983. *See* D. Mot. at 1. To hold a governmental entity liable under § 1983 based on a policy of improperly training or hiring employees, a plaintiff must prove that (1) the training or hiring procedures of the entity's policymaker were inadequate; (2) its policymaker was deliberately indifferent in adopting the hiring or training policy; and (3) the inadequate training and hiring policy directly caused the plaintiff's injury. *City of Canton, Ohio v. Harris,* 489 U.S. 378, 388-89 (1989); *Baker v. Putnal,* 75 F.3d 190, 200 (5th Cir. 1996). Regarding the period preceding Dr. Smith's July 1998 promotion decision, Barrow has introduced no evidence from which a reasonable trier of fact could find that GISD was deliberately indifferent as to its training or supervision of Dr. Smith concerning the religious rights of prospective

(Continued on following page)

summary judgment with respect to Barrow's claims asserted through the procedural mechanism of § 1983.[9]

III

Barrow sues GISD under Title VII asserting that she was subjected to disparate treatment because of her religion.

A

Barrow may prove her Title VII claim based on direct evidence or by using the indirect *McDonnell*

---

job applicants. Concerning the period after which the Board became aware of the July 1998 promotion decision affecting Barrow, there is no genuine issue of material fact concerning whether the allegedly inadequate training policy directly caused Barrow's injury. Moreover, given the court's holding concerning the qualified nature of the religious rights that Barrow has asserted, *see Barrow v. Greenville Independent School District*, 2002 WL 255484, at *2-*5 (N.D. Tex. Feb. 20) (Fitzwater, J.), *appeal docketed*, No. 02-10351 (5th Cir. Mar. 22, 2002), Barrow has not adduced evidence that demonstrates a genuine issue of material fact as to whether the training procedures of GISD regarding the protection of the religious rights of prospective job applicants were inadequate during any time period.

[9] GISD moved for summary judgment based on the absence of evidence of a GISD policy, custom, or practice. The court thereafter addressed certain substantive issues in the context of Dr. Smith's motion for summary judgment based on qualified immunity. *See Barrow*, 2002 WL 255484. The court does not intend, by denying summary judgment on the narrow ground that GISD presents in its motion, to vary any of the reasoning followed in *Barrow*.

Douglas[10] method of proof. *See LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 448 (5th Cir. 1996) (race discrimination case). She contends that Dr. Smith's comments concerning her request for promotion provide direct evidence of intentional discrimination. The court disagrees. "Direct evidence is evidence which, if believed, proves the fact [of intentional discrimination] without inference or presumption." *Portis v. First Nat'l Bank*, 34 F.3d 325, 328-29 (5th Cir. 1994) (quoting *Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993)). "In the content of Title VII, direct evidence includes any statement or written document showing a discriminatory motive on its face." *Id.* at 329. Viewing all evidence in the light most favorable to Barrow as the nonmovant, the court holds that she has presented proof only that Dr. Smith sought to discourage or prevent GISD administrators from enrolling their school-age children in any private school, whatever its religious affiliation. *See, e.g.*, P. App. 685-96, 2952. Barrow's own deposition testimony confirms this view of Dr. Smith's motives. *See* D. App. 274-78, 284-86, 292-94 (reproducing Barrow's testimony stating her view that, under Dr. Smith's requirements, she would remain ineligible for promotion to middle school Assistant Principal so long as her school-age children attended any private school, or engaged in any type of schooling other than within the GISD.

---

[10] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

B

Because the testimony that Barrow cites does not constitute sufficient direct evidence of intent to discriminate based on religion, she must rely on the familiar burden-shifting framework established by the Supreme Court in *McDonnell Douglas*. She first must establish a prima facie case of discrimination. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). Once she meets this burden, GISD is obligated to produce a legitimate, nondiscriminatory reason for the employment decision at issue. *See id.* This is a burden of production, not persuasion, and involves no credibility assessment. *See id.* Once GISD meets this production burden, the presumption of discrimination disappears. *Id.* at 142-43. Barrow must prove by a preponderance of the evidence that the legitimate reasons offered are not the true reasons but are a pretext for discrimination. *Id.* "[T]he plaintiff may attempt to establish that [s]he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'" *Id.* (quoting *Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). "[A] plaintiffs prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 188. "[I]t is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Id.* at 147. "Proof that the defendant's explanation is

unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.* At the summary judgment stage, Barrow need only raise a genuine issue of material fact. *See Tutton v. Garland Indep. Sch. Dist.*, 733 F. Supp. 1113, 1116 (N.D. Tex. 1990) (Fitzwater, J.).

C

The court must first decide whether Barrow has established a prima facie case. To do so under Title VII, Barrow must demonstrate that (1) she was not promoted, (2) she was qualified for the position she sought, (3) she was within the protected class at the time of the failure to promote, and (4) either the position she sought was filled by someone outside the protected class or she was otherwise not promoted because of her religion. *See Rutherford v. Harris County, Tex.*, 197 F.3d 173, 179-80 (5th Cir. 1999) (sex discrimination case) (citing *Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1060 (5th Cir. 1998)). In its brief in support of its motion for summary judgment, GISD does not argue that Barrow has failed to establish a prima facie case of disparate treatment, but instead assumes *arguendo* that Barrow has. *See* D. Br. at 19. The court will do so as well.

D

Because Barrow has satisfied her obligation to present a prima facie case, the burden has shifted to

GISD to produce evidence of a legitimate, nondiscriminatory reason for the employment decision at issue. GISD has met its burden of production by adducing evidence that Dr. Smith's reason for failing to promote Barrow was her choice to educate her children in private school as opposed to public school, not her choice of a religious school in particular. *See, e.g.*, D. App. 211-12, 293. GISD has also produced evidence that Barrow did not receive a promotion because she did not apply for the Assistant Principal position. *See id.* at 220-21.

E

Because GISD has met its burden of production, the inference of unlawful discrimination has disappeared, and Barrow is obligated to introduce evidence that would permit a reasonable trier of fact to find pretext. The court concludes that she has not.

1

Although employees are protected under Title VII from discrimination based on their religious faith, the statute affords no protection from disparate treatment that is based on an employee's desire to educate her children in a private school, even if the school is sectarian. Barrow's deposition testimony confirms that, during a July 30, 1998 meeting, Dr. Smith told her that she would remain ineligible for promotion to middle school Assistant Principal so long as her school-age children attended any private school, or

engaged in any type of schooling other than within the GISD. *See* D. App. 274-78, 284-86, 292-94. Barrow offers no evidence that would permit a reasonable trier of fact to find that Dr. Smith intended to do anything more than invoke a patronage requirement in spite of, rather than because of, her desire to give her children a Christian-based education.

2

Viewing the evidence in the light most favorable to Barrow as the nonmovant, a reasonable trier of fact could find that her failure to comply with any formal application requirement was due to her having received direct communication from Dr. Smith and others associated with the GISD administration that her application would be unsuccessful if she continued to enroll her children in private school. *See, e.g.*, P. App. 2950, 2958-60. Even assuming, however, that Barrow has adduced evidence of pretext relating to her alleged failure to apply for the position,[11] the

---

[11] The citations on which Barrow relies to support her arguments under the rubric, "The District's Excuse Is a Pretext for Discrimination[,]" *see* P. Br. 39-40, violate Rule 56.5(c), *see supra* n.4. The citations that she offers as proof of discrete events and conversations direct the court to review segments of the record that consist of groups of 41, 49, 57, 67, 110, 87, and 52 pages, respectively. The final two citations, of one and two pages, respectively, refer to Barrow's affidavit account of her July 30, 1998 meeting with Dr. Smith, and the court has considered and addressed the evidence relating to this meeting. *See supra* § III(E)(1).

record still would not permit a reasonable inference of discrimination based on religion in view of the summary judgment evidence that Dr. Smith intended to do no more than impose a patronage requirement devoid of any intent to discriminate based on Barrow's Christian religion or the exercise of her faith. *See Reeves,* 540 U.S. at 148 ("Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred."); *see also Vadie v. Miss. State Univ.,* 218 F.3d 365, 374 n.23 (5th Cir. 2000) (quoting *Reeves,* 540 U.S. at 148), *cert. denied,* 531 U.S. 1113 (2001).

Because Barrow has not adduced evidence upon which a reasonable trier of fact could conclude that Dr. Smith's failure to promote her was based on her religion or her choice of specifically religious education for children, the court grants summary judgment in favor of GISD with respect to Barrow's claim of disparate treatment.

IV

Barrow also asserts that GISD employment policies have subjected her, and people similarly situated, to disparate impact, in violation of Title VII. *See* P. Br. at 44-46. To establish a prima facie case of disparate impact, Barrow must show that facially neutral employment standards operate more harshly on one group than another. *See Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1367 (5th Cir. 1992). This initial burden includes proof of a specific practice or set of practices resulting in a significant disparity between the groups. *Id.* Statistical disparities between the relevant groups are not sufficient. *Id.* A plaintiff must offer evidence "'isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.'" *Id.* (quoting *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 655 (1989)).

Barrow has not furnished evidence of any observed statistical disparities caused by GISD's alleged practice of refusing to promote to administrative positions individuals who choose to educate their children in private school. At most, she has adduced evidence that this requirement was applied to her twice, and to Pope once. *See* P. App. 2948, 2983-84. In response, GISD has introduced evidence that while employed by GISD, Assistant Superintendent Mike Cardwell ("Cardwell") educated his children for twelve years in private school, and during that time

was promoted to Assistant Superintendent and served for a time as Interim Superintendent.[12] *See* D. App. 123-29. Taken as a whole, the evidence on which Barrow relies does not satisfy her initial burden of proving that GISD's employment practices have resulted in a significant disparity between Christians and non-Christians, or religious believers and nonbelievers. Consequently, the court grants summary judgment in favor of GISD with respect to Barrow's disparate impact claim.

V

GISD's motion for summary judgment and brief in support demonstrate that GISD has moved for summary judgment only as to Barrow's disparate treatment and disparate impact claims under Title VII. *See* D. Mot. at 1 ("Plaintiff's Title VII claim fails because she cannot produce any evidence to establish that any individual involved in the events in question 'intended' to discriminate against her because of her religion, Christian; nor can she show any facially neutral employment practice of the District that resulted in a burden imposed on her religious beliefs."); *see also id.* at 2 ("Plaintiff cannot meet her burden of proof in any of her 1983 claims or on her

---

[12] Cardwell's testimony reflects that his children attended the Greenville Christian School – the same school to which Barrow desired to send her children – and that they had graduated before Dr. Smith's tenure as Superintendent. *See* D. App. 123-24.

Title VII claim (whether she argues it as a disparate treatment or disparate impact claim)."). In her brief in support of her response, however, Barrow argues that GISD is liable under Title VII on the alternate theory that GISD's hiring standards fail to provide "reasonable accommodation" of her religious practices. *See* P. Br. at 32. She also cites the Fifth Circuit standard for establishing a prima facie case on a "reasonable accommodation" theory. *Id.* at 32 n.42 (citing *Jenkins v. Louisiana,* 874 F.2d 992, 995 (5th Cir. 1985)). In its reply brief, GISD does not argue that Barrow has failed to plead this theory in her amended complaint[13] or that she failed to disclose it as a basis for her Title VII claim in response to a proper discovery request. Because the court may not grant summary judgment on a ground that is not included in a summary judgment motion, *see John Deere Co. v. American National Bank, Stafford,* 809 F.2d 1190, 1192 (5th Cir. 1987), it concludes that Barrow's reasonable accommodation claim remains in the case.

Before GISD filed its motion for summary judgment, Barrow sought leave to file a second amended complaint. The court denied the motion without prejudice due to the pendency of a motion for summary judgment that Dr. Smith had filed. *See* Dec. 4, 2001 Order at 1-3. It permitted her to move anew for

---

[13] Because the notice pleading standard of Fed. R. Civ. P. 8(a) applies, and since she explicitly alleges a Title VII claim, this argument may have lacked merit had it been made.

such relief after the court decided the summary judgment motion. *Id.* at 1. Barrow's proposed second amended complaint specifically alleges that GISD did not reasonably accommodate her religious beliefs and practices. *See* P. Prop. 2d Am. Compl. ¶ 11.10. If allowed as a pleading, it would provide GISD fair notice of her intent to assert such a claim. Under these circumstances, the court grants Barrow leave to amend to file a second amended complaint to assert a reasonable accommodation claim, which would then be the sole remaining Title VII claim against GISD.

VI

In its motion for summary judgment, GISD asserts a simple basis for dismissal of Barrow's state-law claims. It maintains that her "pendent state law claims should be dismissed without prejudice, upon dismissal of the substantive federal claims against the District[.]" D. Mot. at 1. Because the court has held that Barrow may proceed with substantive federal claims under § 1983 and Title VII, GISD is not entitled to dismissal on this basis.

GISD's motion and brief indicate that it seeks, in the alternative, summary judgment solely on Barrow's claims for injunctive relief under Texas law. *See id.* at 1; D. Br. at 24. Under Texas law, "[a] successful applicant for [permanent] injunctive relief must demonstrate the following four grounds for relief: 1) the existence of a wrongful act; 2) the existence of imminent harm; 3) the existence of irreparable injury; and 4) the

absence of an adequate remedy at law." *Priest v. Tex. Animal Health Comm'n,* 780 S.W.2d 874, 875 (Tex. App. 1989, no writ) (citing *Frey v. DeCordova Bend Estates Owners Ass'n,* 647 S.W.2d 246, 248 (Tex. 1983)). GISD contends *inter alia* that Barrow has failed to demonstrate the existence of imminent harm if an injunction is not granted. Barrow acknowledges that in August 2001 she was promoted to Assistant Principal of Greenville High School. *See* P. Br. 19. She has failed to adduce evidence that demonstrates any potential for imminent harm from continuing violations of state law by GISD. Therefore, the court grants GISD's motion for summary judgment with respect to Barrow's state-law claim for injunctive relief.

VII

In a prior opinion, the court dismissed Barrow's action against Dr. Smith, individually, based on qualified immunity and entered a Rule 54(b) final judgment. *See Barrow v. Greenville Indep. Sch. Dist.,* 2002 WL 255484, at *6 (N.D. Tex. Feb. 20, 2002) (Fitzwater, J.), *appeal docketed,* No. 02-10351 (5th Cir. Mar. 22, 2002). Barrow has appealed the court's judgment, and the parties have requested that the trial of this case be stayed during the pendency of the appeal. Accordingly, within 20 days of the date this memorandum opinion and order is filed, the parties must advise the court by joint written submission whether they request that Barrow's action against GISD be abated pending the outcome of the appeal. If

so, the court will abate this part of the case and statistically close it until the appeal is completed; otherwise, the court will conduct such further proceedings as are consistent with the interests of justice.

* * *

The court grants in part and denies in part GISD's October 9, 2001 motion for summary judgment.

SO ORDERED.

April 17, 2002.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	Civil Action No.
	§	3:00-CV-0913-D
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al.,	§	
	§	
	§	
Defendants.	§	

ORDER

(Filed Mar. 4, 2002)

Plaintiff Karen Jo Barrow's ("Barrow's") March 1, 2002 motion to alter or amend judgment is denied. Although the court need not address plaintiff's arguments, one part of the court's February 20, 2002 memorandum opinion and order may benefit from the following clarification.

Barrow maintains that "[t]he Court is incorrect that the Fifth Circuit has *rejected* the hybrid-rights analysis when different constitutional protections are involved." P. Mot. at 6 (emphasis added). The court did not state that the Fifth Circuit had *rejected* hybrid-rights analysis. What it said was that, in *Littlefield v. Forney Independent School District*, 268 F.3d 275 (5th Cir. 2001), "[i]n affirming Judge Maloney's decision, the Fifth Circuit similarly *declined to recognize* a 'hybrid rights' avenue for achieving a heightened standard of review." Mem. Op. at 9 (emphasis added).

It is correct that the *Littlefield* panel "declined to recognize" hybrid rights. *See Littlefield*, 268 F.3d at 293 n.27. However, the court's use of the phrase "similarly declined to recognize" could lead to the conclusion that it was holding that the Fifth Circuit had explicitly decided the question, as had Judge Maloney. Accordingly, to clarify this court's holding and avoid such confusion, the court amends the following sentence on page 9 of its memorandum opinion and order from

> In affirming Judge Maloney's decision, the Fifth Circuit similarly declined to recognize a "hybrid rights" avenue for achieving a heightened standard of review. *See Littlefield*, 268 F.3d at 292-95.

to

> In affirming Judge Maloney's decision, the Fifth Circuit noted his ruling but did not address the issue because it had been abandoned on appeal. *See Littlefield*, 268 F.3d at 293 n.27.

In all other respects the memorandum opinion and order shall remain as filed.

Barrow's March 1, 2002 motion to alter or amend judgment is denied.

SO ORDERED.

March 4, 2002.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW, Plaintiff,	§	
VS.	§	Civil Action No.
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al., Defendants.	§	3:00-CV-0913-D

MEMORANDUM OPINION AND ORDER

(Filed Feb. 20, 2002)

A public school district Superintendent who refused to consider a prospective candidate for the position of middle school Assistant Principal unless she placed her children – who attended a private Christian school – in public school moves based on qualified immunity for summary judgment dismissing plaintiff's 42 U.S.C. § 1983 action seeking relief *inter alia* for alleged federal constitutional rights violations. Concluding that the Superintendent is entitled to qualified immunity, the court dismisses with prejudice plaintiff's federal-law claims against him and, in its discretion, dismisses without prejudice her state-law claims against him.

I

Plaintiff Karen Jo Barrow ("Barrow") sues defendants Greenville Independent School District ("GISD")[1] and Dr. Herman Smith ("Dr. Smith"),[2] its former Superintendent, alleging that her federal constitutional rights were violated when Dr. Smith refused to consider, interview, or recommend her to the GISD Board of Education for a school administrator position unless she enrolled her children in public school.[3] During July 1998, the time period relevant to this lawsuit, Barrow was a classroom teacher employed by GISD who was eligible and qualified to hold the position of Assistant Principal. Her school-age children were students at Greenville Christian School, a private religious school. Dr. Smith assumes for purposes of his summary judgment motion the factual truth of Barrow's assertion that he declined to consider, interview, or recommend her unless she placed

---

[1] GISD has separately moved for summary judgment. The court will decide its motion separately in an opinion to be filed in due course.

[2] Barrow also sued Dr. Smith in his individual capacity under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The court dismissed that claim in a memorandum opinion and order filed July 17, 2000. Because Dr. Smith is no longer the GISD Superintendent, the court on December 4, 2001 substituted his successor as the defendant whom Barrow sues in his official capacity.

[3] Plaintiff asserts causes of action arising under Title V of the Texas Civil Practice and Remedies Code and Article I, § 6 of the Texas Constitution. The court dismisses these claims against Dr. Smith without prejudice.

her children in the public school system, *see* D. Br. at 1, and he moves for summary judgment based on qualified immunity.[4]

II

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Qualified immunity likewise applies to state officials sued for constitutional violations pursuant to § 1983. *See id.* at n.30 (citing *Butz v. Economou,* 438 U.S. 478, 504 (1978)); *Morris v. Dearborne,* 181 F.3d 657, 665 (5th Cir. 1999)). "The Supreme Court has characterized the doctrine as protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Cozzo v. Tangipahoa Parish Council – President Gov't,* ___ F.3d at ___, 2002 WL 32810, at *6 (5th Cir. Jan.

[4] Barrow maintains that because Dr. Smith moves for summary judgment based only on qualified immunity, under this court's local civil rules his motion should have been styled as one for partial summary judgment. She argues that the motion is therefore ambiguous and should be construed against Dr. Smith. *See* P. Br. at 4-5. The motion clearly seeks summary judgment based solely on the defense of qualified immunity. Because this defense, if successful, immunizes Dr. Smith from suit itself rather than merely from liability, *see, e.g., Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985), the motion is correctly styled as a motion for summary judgment rather than for partial summary judgment.

10, 2002) (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)).

To determine whether Dr. Smith is entitled to qualified immunity, the court must first answer the threshold question whether, taken in the light most favorable to Barrow as the party asserting the injury, the facts she has alleged show that Dr. Smith's conduct violated a constitutional right. *See Saucier v. Katz,* ___ U.S. ___, 121 S. Ct. 2151, 2156 (2001) ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." (citing *Siegert v. Gilley,* 500 U.S. 226, 232 (1991))). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* If a violation could be made out on a favorable view of the parties' submissions, "the next, sequential step is to ask whether the right was clearly established." *Id.* "The objective reasonableness of allegedly illegal conduct is assessed in light of the rules clearly established at the time it was taken." *McClendon v. City of Columbia,* 258 F.3d 432, 438 (5th Cir. 2001) (footnote omitted). "Even if an official's conduct violates a constitutional right, he is entitled to qualified immunity if the conduct was objectively reasonable." *Id.* (footnote omitted). "'The defendant's acts are held to be objectively reasonable unless *all* reasonable officials in the defendant's

circumstances would have then known that the defendant's conduct violated the' plaintiff's asserted constitutional or federal statutory right." *Cozzo*, ___ F.3d at ___, 2002 WL 32810, at *6 (quoting *Thompson v. Upshur County, Tex.*, 245 F.3d 447, 457 (5th Cir. 2001)).[5]

III

A

The court turns initially to the question whether Barrow has alleged a constitutional violation. Barrow asserts that, in his capacity as GISD Superintendent,

---

[5] This determination is a matter of law for the court to decide. *See Siegert*, 500 U.S. at 232. Similarly, the questions whether the applicable law was clearly established at the time of Dr. Smith's conduct and whether his conduct was objectively reasonable under the extant law are both questions of law for the court. *See Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999) ("Objective reasonableness is a matter of law for the courts to decide, not a matter for the jury."). For these reasons, the court grants Dr. Smith's November 5, 2001 motion to st ke Barrow's proffer of expert testimony by Allan E. Parker, Jr., Esquire ("Professor Parker"), a former law professor and present president of the Texas Justice Foundation. Because Professor Parker's expressed opinions regarding the state of the law and the reasonable actions of a school Superintendent in light of the law, *see* Dr. Smith App. (Mot. to Strike) at 22, do not "assist the trier of fact to understand the evidence or to determine a fact in issue," the court declines under Fed. R. Evid. 702 to admit them. Even assuming *arguendo* that Professor Parker's testimony were admitted, this evidence would not alter the court's conclusions regarding what rights were clearly established or whether Dr. Smith's actions were objectively reasonable.

Dr. Smith stated that he would not consider her for promotion to an administrative position with the GISD so long as she chose to educate her school-age children in a private school. *See* P. Am. Compl. at ¶¶ 6.29, 6.32.[6] She has introduced evidence in support of this allegation that, for purposes of this motion, Dr. Smith does not contest. Barrow does not allege that Dr. Smith expressed or acted upon an animus against Christian or religious private schools in particular, nor has she adduced any evidence in support of such a conclusion. Rather, she has presented proof that Dr. Smith sought to discourage or prevent GISD administrators from enrolling their school-age children in any private school, regardless of religious affiliation. *See* D. App. 988, 870-71, 916-17, 1013-14, 1060-61. Barrow's deposition testimony confirms this view of Dr. Smith's motives. *See id.* at 783-785 (reproducing Barrow's testimony stating her view that, under Dr. Smith's requirements, she would remain ineligible for promotion to middle school Assistant Principal so long as her school-age children attended any private school, or any public school outside the jurisdiction of GISD).

---

[6] Barrow alleges that she was informed that "she would be required to remove her children from their private Christian education and to place them in a public school education within the independent school district where she resided." P. Am. Compl. at ¶ 6.29; *see id.* ¶ at 6.32 ("in either the [GISD] or another independent school district but not in private education").

Based on this conduct, Barrow alleges in her first amended original complaint ("amended complaint") that the following federal constitutional rights were abridged: (1) the right under the First and Fourteenth Amendments to protection of family relationships, the right to direct one's children's educations, and the right of familial privacy (count I); (2) a liberty interest and due process right under the Fourteenth Amendment Due Process Clause to make decisions concerning familial relationships and practices, including the direction and control of one's children's education (count II); and (3) the right under the First Amendment Free Exercise Clause to the free exercise of one's religious faith by choosing to educate one's children in a religious educational institution according to that faith (count III).[7] In sum, Barrow asserts

---

[7] At the specific part of her brief in opposition to Dr. Smith's motion that addresses whether she has alleged a constitutional violation, she identifies the following violations as being set out in her amended complaint: (1) the right to educate one's children in a private religious educational institution, protected by the First Amendment and the penumbra of familial rights guaranteed under the First and Fourteenth Amendments; (2) the right under the Fourteenth Amendment to make decisions concerning one's family relationships, including the direction and control of one's children's educations; and (3) the First Amendment right to exercise freely and to practice one's religious faith. *See* P. Br. at 17-18 n.16. Elsewhere in her brief, she identifies as the clearly established constitutional rights at issue "the fundamental right under the First and Fourteenth Amendments of parents to direct the care, custody, control, upbringing, association, and education of their children." *Id.* at 1. She also specifies as a constitutional right the prohibition against government's burdening a citizen's exercise of religion absent a compelling state

(Continued on following page)

violations of her "First Amendment association rights, First Amendment free exercise right, First Amendment family and privacy rights, and the Plaintiff's liberty and due process rights guaranteed to her under the Fourteenth Amendment." P. Br. at 18. While Barrow refers to certain broadly-recognized constitutional rights, the inquiry into whether the facts alleged show a constitutional violation "must be undertaken in light of the specific context of the case, not as a broad general proposition[.]" *Saucier v. Katz*, ___ U.S. at ___, 121 S.Ct. at 2156.

---

interest for doing so. *Id.* at 2. In the course of arguing that the constitutional rights she asserts were clearly established, Barrow contends she had a First Amendment right and liberty interest in the care, custody, control, upbringing, association, and education of her children that is protected by the substantive component of the Fourteenth Amendment Due Process Clause and a right not to have the exercise of that right or interest burdened by government action. *Id.* at 19-20. She argues that when this fundamental right or interest, or her First Amendment right of association, are burdened, the government's actions are subject to strict scrutiny and will be upheld only when the restrictions are narrowly tailored to a compelling government interest. *Id.* at 19-20. In the subheadings under the part of her brief that addresses whether her constitutional rights were clearly established, Barrow identifies these rights: (1) a substantive due process right to make a family decision to educate the family's children in a private religious school, *id.* at 20; and (2) to exercise freely her religion by sending her children to a religious school, *id.* at 25.

1

The court considers first Barrow's parental rights claims under the First and Fourteenth Amendments.[8] Barrow relies on the recent statement by the Supreme Court in *Troxel v. Granville,* 530 U.S. 57, 65 (2000) (plurality opinion), that one of "the fundamental liberty interests" recognized under the Constitution is the "interest of parents in the care, custody, and control of their children." She argues that this interest has long been recognized in constitutional jurisprudence, citing such cases as *Meyer v. Nebraska,* 262 U.S. 390, 401 (1923) (concluding that liberty interest protected by due process includes right of parents "to control the education of their own"); *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925)

---

[8] The court considers together the claims that Barrow asserts in counts I and II of her amended complaint. This approach is consistent with the one the Fifth Circuit has taken in several cases that involve similar factual and legal allegations. *See, e.g., Kipps v. Callier,* 205 F.3d 203, 204-05 (5th Cir. 2000) (on rehearing) (analyzing under framework of Fourteenth Amendment "liberty interest in familial association" employee's claim that employment action taken by state university interfered with employee's freedom of association with his son); *see also Cook v. Hudson,* 511 F.2d 744, 745 (5th Cir. 1975) (applying same analysis to plaintiffs' First Amendment freedom of association and Fourteenth Amendment due process claims in school discharge context). In this respect, her First and Fourteenth Amendment rights are related. *See Fyfe v. Curlee,* 902 F.2d 401, 403 (5th Cir. 1990) ("Mrs. Fyfe's decision to send her child to a private school was protected under the First Amendment and the penumbra of familial privacy rights recognized by the Supreme Court.")

(holding that "the liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control"); and *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944) (recognizing constitutional interest of parents in directing "custody, care and nurture of the child"). Barrow argues that these cases, taken together, require that strict scrutiny review be applied to Dr. Smith's conduct. *See* P. Br. at 19-23. The court disagrees.

The Fifth Circuit recently reviewed this line of cases in addressing an assertion of parental rights in a public school context. It concurred with decisions of other circuits, and of the district court, that under *Meyer, Pierce,* and *Wisconsin v. Yoder,* 406 U.S. 205 (1972), the rational-basis test is the appropriate standard of review. *Littlefield v. Forney Indep. Sch. Dist.,* 268 F.3d 275, 291 (5th Cir. 2001); *see also Cook v. Hudson,* 511 F.2d 744, 747 (5th Cir. 1975) (holding that patronage policy was constitutional based on "determination that the rational relation test had been met"). The *Littlefield* panel held that "*Troxel* does not change the above reasoning in the context of parental rights concerning public education." *Littlefield,* 268 F.3d at 291. It also stated that "[i]t has long been recognized that parental rights are not absolute in the public school context and can be subject to reasonable regulation." *Id.* (citing *Runyon v. McCrary,* 427 U.S. 160, 177 (1976) (recognizing no parental right to educate children in private segregated academies)).

Where rational-basis scrutiny applies,

> the State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative "'any reasonably conceivable state of facts that could provide a rational basis for the [regulation].'"

Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (quoting *Heller v. Doe,* 509 U.S. 312, 320 (1993); *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993)); *see also Cook,* 511 F.2d at 749-50 (Roney, J., concurring) (stating that where plaintiffs were barred from continued employment with school district because of failure to comply with school's patronage policy, "[t]he plaintiffs had the burden of proving that the action of the school authorities in failing to rehire them was unconstitutional.").

Although the court rejects Barrow's reliance on a strict scrutiny standard to establish a constitutional violation, she also alleges in her amended complaint that her "decision to educate her children in a private education system as opposed to a public education system does not materially and substantially interfere with the effectiveness of the Greenville Independent School District." P. Am. Compl. at ¶ 7.10. The court construes this assertion to posit that the patronage requirement would fail under rational basis review,

as well.[9] The court therefore holds that Barrow has alleged a violation of her parental rights under the First and Fourteenth Amendments.

2

The court turns next to Barrow's claim that Dr. Smith violated her First Amendment right to the free exercise of religion. As with her cause of action based on parental rights, Barrow argues that strict scrutiny is the applicable standard of review. *See* P. Br. at 2. Barrow neither has alleged that Dr. Smith expressed or acted upon an animus against Christian or religious private schools in particular, nor has she adduced any evidence to support such a conclusion. Viewed favorably to her, Barrow's summary judgment evidence shows only that Dr. Smith sought to discourage or prevent GISD administrators from enrolling their school-age children in any private school, regardless of the institution's particular religious

[9] This passage from Barrow's amended complaint, which uses language referring to material and substantial interference with the effectiveness of the school district's operations, can be found in Fifth Circuit decisions such as *Brantley v. Surles*, 718 F.2d 1354, 1359 (5th Cir. 1983), and *Fyfe*, 902 F.2d at 404, that similarly address the constitutionality of school district patronage policies. The court reads these cases, and prior precedent, as applying the equivalent of rational basis scrutiny. *See also Cook*, 511 F.2d at 746-47 (upholding school patronage policy under "rational relation" review based on district court finding "that the challenged policy was significantly related to a teacher's effectiveness and job performance").

affiliation. *See* D. App. 988, 870-71, 916-17, 1013-14, 1060-61.

Barrow argues that because, as in *Yoder,* she has alleged a violation of both her Fourteenth Amendment parental rights and her First Amendment free exercise rights, strict scrutiny applies. In Judge Maloney's opinion in *Littlefield,* he examined the origins of, and recent case law addressing, this so-called "hybrid rights" approach. In accordance with the reasoning of the First, Sixth, Ninth, and Tenth Circuits, he explicitly declined to adopt it. *Littlefield v. Forney Indep. Sch. Dist.,* 108 F.Supp.2d 681, 705-06 (N.D. Tex. 2000) (Maloney, J.), *aff'd, Littlefield v. Forney Indep. Sch. Dist.,* 268 F.3d 275 (5th Cir. 2001). In affirming Judge Maloney's decision, the Fifth Circuit similarly declined to recognize a "hybrid rights" avenue for achieving a heightened standard of review. *See Littlefield,* 268 F.3d at 292-95.[10]

Based on the allegations and evidence at issue, the court concludes that Dr. Smith's school attendance requirement constituted a neutral, generally applicable regulation that was not enacted to inhibit a particular faith or religion in general. Accordingly,

---

[10] In *Peterson v. Minidoka County Sch. Dist.,* 118 F.3d 1351, 1357 (9th Cir. 1997), a case involving an elementary school principal who desired to home school his children, the Ninth Circuit applied strict scrutiny where the plaintiff alleged violations of both his parental and free exercise rights. This court is obligated, of course, to follow binding precedent of the Fifth Circuit.

it "will withstand a free exercise challenge when the regulation is reasonably related to a legitimate state interest." *Littlefield,* 268 F.3d at 292 (citing *Employment Div., Dept. of Human Res. of Or. v. Smith* 494 U.S. 872, 885 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hileah,* 508 U.S. 520, 531 (1993)). Because Barrow alleges in her amended complaint that her decision to educate her children in a private rather than public school system does not materially and substantially interfere with the effectiveness of GISD, P. Am. Compl. at ¶ 7.10 – an assertion that states a rational basis claim – the court holds that she has alleged the violation of her right to the free exercise of religion.

B

Because Barrow has alleged violations of constitutional rights, the court must now decide whether the rights were clearly established in July 1998, when the conduct at issue occurred. *See Wooley v. City of Baton Rouge,* 211 F.3d 913, 919 (5th Cir. 2000) (stating that "the applicable law that binds the conduct of officeholders must be clearly established at the very moment that the allegedly actionable conduct was taken.") (citing *Stem v. Ahearn,* 908 F.2d 1, 5 (5th Cir. 1990)). This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition[.]" *Saucier,* ___ U.S. at ___, 121 S.Ct. at 2156. The court must determine whether "the contours of [the] right asserted are sufficiently clear that a reasonable official would understand that what

he is doing violates that right." *White v. Taylor,* 959 F.2d 539, 544 (5th Cir. 1992). "The standard is formulated at this level of generality in order to afford the measure of protection that the doctrine is intended to confer." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier,* ___ U.S. at ___, 121 S.Ct. at 2156.

Court decisions in effect at the time of Dr. Smith's actions established as a broad, general proposition that constitutionally-protected parental and free exercise rights applied in the public school context. In the more relevant circumstances of rights held by persons who sought employment as public school administrators, however, the rights clearly established in July 1998 were qualified rather than absolute. "[In] the realm of public school employment, the court must balance the interests of the school employee with the interest of the state in promoting efficiency in the educational services which it provides through its school employees." *Fyfe v. Curlee,* 902 F.2d 401, 405 (5th Cir. 1990) (quoting *Brantley v. Surles,* 718 F.2d 1354, 1359 (5th Cir. 1983)). Under this balancing test, although the state's power to impede a person's constitutional rights was limited, it could "legitimately interfere with the constitutionally protected conduct of a public school employee whenever that conduct materially and substantially impede[d] the operation or effectiveness of the educational program." *Brantley,* 718 F.2d at 1359; *accord*

Fyfe, 902 F.2d at 405 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)).

In his brief, Dr. Smith argues that his decision not to hire as administrators candidates who chose private education for their children was in part justified by a desire to signal to parents considering educating their children in the GISD that top-level administrators were loyal to, and believed in, the public education system. *See* D. Br. at 43. This single justification could alone serve as a rational basis for requiring Barrow to place her children in public school in order to be eligible for promotion to an administrator position. The Supreme Court and the Fifth Circuit have each recognized the significant state interest in promoting the effective functioning of the public schools. Supported by appropriate objective evidence, a patronage requirement could conceivably be shown to materially and substantially advance the effectiveness of GISD's educational program.[11] Given the qualified nature of the constitutional rights Barrow asserts, the court holds that it was not clearly established in July

[11] In its focus on administrative personnel, the requirement in the present case differs from the ones in *Fyfe*, 902 F.2d at 405 (elementary school principal's secretary); *Brantley*, 718 F.2d at 1359 (cafeteria worker); and *Stough v. Crenshaw County Bd. of Educ.*, 744 F.2d 1479, 1482 (11th Cir. 1984) (classroom teacher), where in each case there was "no evidence" that the plaintiff's noncompliance with the patronage policy would materially and substantially interfere with the effectiveness of the school system.

1998 that the school patronage requirement at issue violated those rights.[12]

Accordingly, Dr. Smith is entitled to qualified immunity because Barrow has failed to demonstrate in the specific relevant context that she has alleged a violation of a clearly established right.

C

To prevail against Dr. Smith's defense of qualified immunity, Barrow must also demonstrate that he was objectively unreasonable in his belief that the requirement he imposed was rationally related to the legitimate state objective of enhancing the functioning of the public school system. This would entail proof that all reasonable officials in his circumstances would have known that such conduct violated Barrow's constitutional rights. *See Cozzo,* ___ F.3d at ___, 2002 WL 32810, at *6.

---

[12] The Fifth Circuit holds that a final step in the qualified immunity inquiry requires that the court consider whether "the record shows that the violation occurred, or at least gives rise to a genuine issue of material fact as to whether the defendant actually engaged in conduct that violated the clearly-established right." *Morris,* 181 F.3d at 666 (quoting *Kerr v. Lyford,* 171 F.3d 330, 339 (5th Cir. 1999)). Because Barrow bears the burden of proving that Dr. Smith's requirement was not rationally related to a legitimate state interest, and she has adduced no evidence that would permit a reasonable trier of fact to find that she has satisfied the factual components of this burden, Dr. Smith is entitled to summary judgment on the additional ground that no genuine issue of material fact is present concerning his liability for a constitutional violation.

The court holds that *all* reasonable officials would *not* have known of such a violation. A reasonable Superintendent could have concluded that it was constitutional in July 1998 to condition a public school administrator's employment on sending her children to public school, once the Superintendent determined that not imposing such a restriction would materially and substantially impede the operation and effectiveness of the educational program. *See Kipps v. Callier,* 197 F.3d 765, 769 (5th Cir. 1999) (holding head football coach's firing of assistant coach on basis that assistant coach's son chose to attend rival college to be objectively reasonable where desire to enhance recruiting and alumni relations by preserving image of loyalty was cited as reason for firing), *modified on rehearing on other grounds,* 205 F.3d 203 (2000).[13] Dr. Smith is therefore entitled to qualified immunity on this additional ground.

---

[13] Barrow maintains that there is summary judgment evidence that Dr. Smith admitted he knew that considering where Barrow chose to educate her children was inappropriate and would violate clearly established employment law. *See* P. Br. at 47-48 (citing P. App. 249-50). It is well settled, however, that "an individual defendant's subjective state of mind is irrelevant to the qualified immunity inquiry." *Cozzo,* ___ F.3d at ___, 2002 WL 2002 WL [sic] 32810, at *7; *see also Kipps,* 197 F.3d at 769 (citing *Pfannstiel v. City of Marion,* 918 F.2d 1178, 1187 (5th Cir. 1990); *Malley,* 475 U.S. at 341).

IV

Barrow contends that qualified immunity extends only to civil damages but not to nominal damages or injunctive relief. The court disagrees. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth,* 472 U.S. 551, 526 (1985). "The [qualified immunity] privilege is 'an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Saucier,* ___ U.S. at ___, 121 S.Ct. at 2156 (quoting *Mitchell,* 472 U.S. at 526).

V

"[W]hen all federal claims are dismissed or otherwise eliminated from a case prior to trial, [the Fifth Circuit has] stated that [its] 'general rule' is to decline to exercise jurisdiction over the pendent state law claims." *McClelland v. Gronwaldt,* 155 F.3d 507, 519 (5th Cir. 1998) (citing *Wong v. Stripling,* 881 F.2d 200, 204 (5th Cir. 1989)). Accordingly, the court dismisses without prejudice Barrow's state-law claims against Dr. Smith.

* * *

Dr. Smith's October 1, 2001 motion for summary judgment is granted.[14] The federal-law claims against

[14] Dr. Smith objects to some evidence contained in Barrow's appendix. Because he is entitled to qualified immunity regardless

(Continued on following page)

him are dismissed with prejudice and the state-law claims are dismissed without prejudice. In view of this decision, Barrow's October 1, 2001 motion for partial summary judgment is denied.

SO ORDERED.

February 20, 2002.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

---

whether these challenged items are considered, his November 8, 2001 objections to plaintiff's evidence are overruled.

Dr. Smith moves to substitute a revised copy of his own affidavit for the copy that was originally included in his appendix. The revised affidavit corrects certain page references and other citations that were the subject of typographical errors or were omitted in the original appendix. Because Barrow has not responded to the motion and the court discerns no prejudice that will result from granting this relief, Dr. Smith's December 12, 2001 motion for leave to substitute evidence is granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KAREN JO BARROW,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	Civil Action No.
	§	3:00-CV-0913-D
GREENVILLE INDEPENDENT SCHOOL DISTRICT, et al.,	§	
	§	
	§	
Defendants.	§	

JUDGMENT

(Filed Feb. 20, 2002)

For the reasons set out in memorandum opinions and orders filed July 17, 2000 and today, it is ordered and adjudged that plaintiff's federal-law claims against defendant Dr. Herman Smith ("Dr. Smith") are dismissed with prejudice and her state-law claims against Dr. Smith are dismissed without prejudice.

Dr. Smith's taxable costs of court, as calculated by the clerk of court, are assessed against plaintiff.

Pursuant to Fed. R. Civ. P. 54(b), the court expressly determines that there is no just reason for delay and directs the clerk of court to enter this as a final judgment.

Done at Dallas, Texas this 20th day of February, 2002.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-10123

KAREN JO BARROW

Plaintiff-Appellant-Cross Appellant

v.

GREENVILLE INDEPENDENT SCHOOL DISTRICT; Et Al

Defendants

HERMAN SMITH, Dr

Defendants-Appellant-Cross Appellee

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Filed Nov. 20, 2007)

(Opinion 10/23/07, 5 Cir., ___, ___ F.3d ___)

Before GARWOOD, SMITH and DeMOSS

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor

judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

The court orders that costs under F.R.A.P. 39 be taxed as follows: each party to bear its own costs.

ENTERED FOR THE COURT:

/s/ William Garwood
United States Circuit Judge

No. 07-1089

FILED
APR 14 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DR. HERMAN SMITH,

Petitioner,

v.

KAREN JO BARROW,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

WM. CHARLES BUNDREN
2591 Dallas Parkway,
Suite 300
Frisco, Texas 75034
Telephone: (972) 624-5338
Facsimile: (972) 524-5340

KELLY J SHACKELFORD
Counsel of Record
HIRAM S. SASSER, III
ROGER L. BYRON
LIBERTY LEGAL INSTITUTE
903 East 18th Street,
Suite 230
Plano, Texas 75074
Telephone: (972) 423-3131
Facsimile: (972) 423-6570

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did this Court err when it denied Petitioner's writ of certiorari seeking review of the substantive decision in *Barrow I*?

2. Did the Fifth Circuit err in upholding its qualified immunity ruling in *Barrow I*, which was based solely on precedent clearly established in the circuit for twenty-five years?

3. Did the District Court abuse its discretion in holding "the value of the judgment Barrow obtained, plus the value of Barrow's pre-offer court costs and attorney's fees, exceeded $100,000" and thus Petitioner's "Rule 68 offer of judgment does not entitle him to relief"?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT	1
I. Factual Background	1
II. Proceedings Below	3
ARGUMENT	4
I. The Petition Does Not Present an Important Legal Issue on Which There Is Conflicting Authority	5
A. There Is No Division in the Law nor Split Among the Circuit Courts of Appeals	6
B. There Has Been No Change in Fact or Law Relevant to This Petition Since the Court Denied Review of *Barrow I*	9
II. *Saucier*'s "Rigid Order of Battle" Was Irrelevant to the Outcome of This Case	12
III. The Petition Seeks Review of the Fact-Bound Application of Settled Legal Principles and the Fifth Circuit Applied the Law-of-the-Case Doctrine in a Factually Limited Manner	14
IV. The District Court Did Not Abuse Its Discretion in Awarding Fees	17
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Adams v. Unione Mediterranea di Sicurta, 364 F.3d 646 (5th Cir. 2004) 19

Agostini v. Felton, 521 U.S. 203 (1997) 16

Angstadt v. Midd-West Sch. Dist., 377 F.3d 338 (3d Cir. 2004) 7

Arizona v. California, 460 U.S. 605 (1983) 16

Associated Builders & Contractors of La., Inc. v. Orleans Parish Sch. Bd., 919 F.2d 374 (5th Cir. 1990) 19

Barrett v. Steubenville City Schs., 388 F.3d 967 (6th Cir. 2004), *cert. denied*, 546 U.S. 813 (2005) 7, 8, 10, 14, 17

Basha v. Mitsubishi Motor Credit of Am., Inc., 336 F.3d 451 (5th Cir. 2003) 20

Brantley v. Surles, 718 F.2d 1354 (5th Cir. 1983) 9, 12, 13, 14, 15

Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995) 7

Ellis v. Liberty Life Assurance Co., 394 F.3d 262 (5th Cir. 2004) 10

Fyfe v. Curlee, 902 F.2d 401 (5th Cir. 1990) 9, 12, 13, 14, 15

Hensley v. Eckerhart, 461 U.S. 424 (1983) 19

Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996) 7

TABLE OF AUTHORITIES – Continued

Page

Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000).....19

Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003).....7

Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001).....6

Meyer v. Nebraska, 262 U.S. 390 (1923).....5, 7

Montgomery v. Carr, 101 F.3d 1117 (6th Cir. 1996).....8

Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).....5, 7

Reno v. Flores, 507 U.S. 292 (1993).....5

Saucier v. Katz, 533 U.S. 194 (2001).....12, 14

Smith v. Barrow, 540 U.S. 1005 (2003).....*passim*

Stough v. Crenshaw County Bd. of Educ., 744 F.2d 1479 (11th Cir. 1984).....8

Troxel v. Granville, 530 U.S. 57 (2000).....5

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971).....10

STATUTES

5 U.S.C. § 574(c).....18

28 U.S.C. § 652(d).....18

OTHER AUTHORITIES

Civil Justice Expense and Delay Reduction Plan, Northern District of Texas.....18

STATEMENT

Petitioner seeks review from this Court, for the second time in this case, of whether the courts below erred when they denied Petitioner qualified immunity after extensive discovery and over fifty volumes of record in *Barrow I* and after a two week jury trial and seventy-four volumes of record in *Barrow III*.

I. Factual Background

In July of 1998, Karen Jo Barrow's (hereinafter "Barrow") children were enrolled at the Greenville Christian School, a private religious school. Mrs. Barrow applied for the Assistant Principal position at the Greenville Middle School which was open and to be filled in July of 1998. (R.,Vol. 17, docket item 167 at 918-32, 937-42, ¶¶ 49-60). In May of 1998, at the direction of Petitioner,[1] Joan Graves, a senior school official, approached Mrs. Barrow and asked her if she would consider moving her children to the public schools so that she could be "considered" as an applicant for the assistant principal position. (R.,Vol. 14 at 88-141; Vol. 17 at 918-38). Mrs. Barrow told Mrs. Graves that she definitely wanted the position but would not sacrifice her boys' religious education to get the job. *Id.*

Mrs. Barrow's name was placed in the pool as an applicant during a superintendent's council meeting on July 13, 1998. (R.,Vol. 16 at 574-641). Petitioner

---

[1] Petitioner, Smith, was the school district superintendent.

directed the Assistant Superintendent for personnel, William Smith, to talk to Mrs. Barrow about where she chose to educate her children and to see if she would be willing to move her children to the public schools so she could be considered for the position. (R.,Vol. 15 at 306-416). Petitioner later admitted to Susan Crow, the teacher who was hired to fill the position instead of Mrs. Barrow, that Mrs. Barrow was not hired because of "where she educated her children." (R.,Vol. 16 at 538-60). Petitioner told Mrs. Barrow and her husband at a personal meeting on July 30, 1998, that the only reason he did not recommend Mrs. Barrow for the assistant principal position was because of where she chose to educate her children and that she had "no future" at the Greenville Independent School District ("GISD") as long as she chose to educate her children at the Greenville Christian School (R.,Vol. 17 at 924). GISD admitted in its EEOC response to Mrs. Barrow's Title VII claim that Petitioner refused to consider Mrs. Barrow because of where she "[chose] to educate her children" and that it would be a "factor" if she interviewed for a promotion. (Barrow's R.E. 2; R.,Vol. 17 at 850-54). At trial, the jury found that a motivating factor in Petitioner's decision to refuse to recommend Mrs. Barrow for the promotion was where Mrs. Barrow educated her children. (R.E. 9 at 11).

Mrs. Barrow obtained a Judgment against Petitioner for $15,455.00 in compensatory damages and $20,000.00 in punitive damages and prejudgment interest. Upon her application for attorney fees, the district court awarded Mrs. Barrow some of her fees and taxable court costs. (R.E. 14).

II. Proceedings Below

Upon Petitioner's refusal to recommend Mrs. Barrow for the promotion because she failed to comply with a "public school only" patronage employment condition, Mrs. Barrow filed suit against GISD and Petitioner alleging, *inter alia*, that Petitioner violated Mrs. Barrow's constitutional right as a parent to choose private education for her children by denying her a recommendation for a promotion because she refused to comply with the "public school only" employment condition. (R.,Vol. 1 at 1-19).

The district court's summary judgment for Petitioner on qualified immunity was reversed by the Fifth Circuit in *Barrow I*. This court denied cert. *Smith v. Barrow*, 540 U.S. 1005 (2003). The claims against Petitioner were tried to a jury. The jury rendered a verdict against Petitioner. (R.E. 9; R. 4635). The district court entered Judgment for Mrs. Barrow against Petitioner. (R.E. 511). All parties filed post-judgment motions. (R. 5103). The district court denied the motions. (R.E. 12). The court awarded Mrs. Barrow some of the attorneys fees she sought and denied others. (R.E. 14).

Petitioner filed a timely Notice of Appeal and Mrs. Barrow filed a timely cross Notice of Appeal. (Barrow's R.E. 1). The Fifth Circuit Court of Appeals in a unanimous unpublished opinion affirmed the judgment of the district court. Pet. App. 24.

ARGUMENT

The petition seeks review of a fact-bound case that consists of over seventy-four volumes of record and almost ten years of litigation. The case's central issue, and that of the petition – whether it is clearly established law that a government official may not deny a job applicant a promotion because she chooses private education for her children – already has been litigated in this case once before this Court, twice before the Fifth Circuit and at least nine times in the District Court in separate motions and filings. *See* Record Vol. 57, pp. 3552, 3556-61 and court order at 3587 (instructing Petitioner to stop raising the issue of qualified immunity); Vol. 59, pp. 4061-7; Vol. 61, pp. 4544, 4563-66; Vol. 60, pp. 4240-41; Vol. 62, pp. 4715-19; Vol. 60, pp. 4202-09; Vol. 62, pp. 4730, 4740-45; Vol. 63, pp. 4747, 4758-75 and pp. 5118-21.

There has never been a single appellate judge in this case who expressed an opinion that Petitioner should prevail. *Barrow I* and *Barrow III* were unanimous and after both Fifth Circuit decisions, Petitioner sought *en banc* review. No judge on the Fifth Circuit ever requested that the court even be *polled* on rehearing *en banc* in either appeal. This Court denied Petitioner's petition after *Barrow I*. The current petition, which seeks a review of an **unpublished** decision with no precedential value, is nothing more than an attempt to re-litigate the qualified immunity question once again and this petition should also be denied. Not surprisingly, Petitioner's alleged split is illusory. And the petition itself only

rehashes, with no relevant change in fact or law, substantially the same claims and arguments which Petitioner presented to this Court four years ago in unsuccessfully seeking review of *Barrow I*. In addition, Petitioner has requested this Court correct alleged error in the district court's calculation and award of attorney fees. It is not this Court's practice to reconsider the same claims and issues in the same case on the same record, nor is this Court one of error correction. Petitioner, nonetheless, seeks this Court's review.

I. The Petition Does Not Present an Important Legal Issue on Which There Is Conflicting Authority

Other than a rather odd claim that *Barrow I* conflicts with precedent established by this Court,[2] and presumably this Court erred by not reviewing *Barrow I*, the only conflict analysis arguing a circuit split is contained in the brief assertions on pages 16 and 17. In these two pages, Petitioner cites to a string citation of cases, with only three or four cases post-*Troxel*. This is not much "confusion" and certainly

---

[2] The right of a parent to choose private or public education for her children has been a "fundamental right" for over eighty years, and fundamental rights require strict scrutiny. *See Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (scrutiny for "fundamental" rights is strict scrutiny); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (the right of a parent to control the education of her child is a "fundamental right"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

this scant analysis is not indicative of a major split on an important and discrete area of the law. Petitioner's main argument for a split appears to rest on the premise that the Fifth Circuit is split within itself, yet no judge on the Fifth Circuit thought the holding in *Barrow I* or *Barrow III* was worthy of reconsideration or review.[3]

A. There Is No Division in the Law nor Split Among the Circuit Courts of Appeals

Petitioner presents no credible division in the law. Petitioner's primary argument for a split among the Circuit Courts of Appeals appears to consist of a largely undeveloped and conclusory statement that Fifth Circuit "decisions" have created "conflict with the precedents of numerous other courts of appeals" combined with a lengthy string cite reduced to a footnote. Pet. 16 & 16 n.2. Not a single case included in the string cite is even remotely on point. Each of the cases concern parents' and students' dissatisfaction either with the educational requirements and administration of public education, statewide education standards, the availability of public education services or complaints about uniforms or student clothing. None deal directly or indirectly with a parent's right to choose for her children a particular

---

[3] Petitioner's complaint that *Littlefield* and *Barrow* conflict, even if true, is simply more incentive for this Court to deny review. The Court should deny review and wait until the Fifth Circuit has resolved this alleged conflict within its own circuit.

means of education, here private school over public school, much less the application of that right in a public education employment context. They concern, instead, parents claiming the "rights" for their children to avoid health class and mandatory community service and to play interscholastic sports. *See, e.g., Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996); *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338 (3d Cir. 2004). Interestingly, at least two of the cases cited expressly recognize the difference between the administration of public education and a parent's right to decide whether to use public education at all. *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533-34 (1st Cir. 1995) (finding it "fundamentally different," in the court's discussion of *Meyer* and *Pierce*, "for the state to say to a parent, 'You can't teach your child German or send him to a parochial school,' than for the parent to say to the state, 'You can't teach my child subjects that are morally offensive to me.'"); *Angstadt*, 377 F.3d at 344 (differentiating between regulations governing interscholastic sports and parents' "ability to educate their daughter in the manner they choose.").

Petitioner fails to cite the only cases from the other Circuit Courts of Appeals that *are* directly on point. There are only two. In *Barrett v. Steubenville City Schs.*, 388 F.3d 967 (6th Cir. 2004), *cert. denied*, 546 U.S. 813 (2005), a school superintendent refused to hire a teacher unless the teacher removed his child from private school and enrolled him in public school. The Sixth Circuit found this violated the teacher's

constitutional right to direct the upbringing of his child and affirmed the order denying the superintendent qualified immunity.[4] In *Stough v. Crenshaw County Bd. of Educ.*, 744 F.2d 1479 (11th Cir. 1984), a patronage policy adopted by the county school board prohibited its teachers from enrolling their children in private schools on penalty of termination. The Eleventh Circuit affirmed the judgment in favor of the teachers, finding that the policy impermissibly interfered with the teachers' constitutional right to control the education of their children.

In sum, an assertion that there exists a division in the law is difficult to support when all of the cases purportedly demonstrating the division fail even to address the issue in question. As for the cases that are on point, arrival at the same conclusion for the same issue on virtually identical facts hardly denotes a split in the circuits. Even had the cases on point arrived at separate conclusions, as only two other circuits have even broached the issue with only one case in each circuit, the law could hardly be considered developed to the point where it is ripe for review

---

[4] The Sixth Circuit, like the Fifth Circuit, did not find it necessary to articulate a level of scrutiny because if the "motivation for a public official in taking some adverse employment action against a public employee is the public employee's protected activity, then regardless of the level of scrutiny applied, such action is unconstitutional." *Steubenville*, 388 F.3d at 973 (quoting *Montgomery v. Carr*, 101 F.3d 1117, 1127 (6th Cir. 1996)).

by this Court. This case presents no division or split in the law for this court to review.

B. There Has Been No Change in Fact or Law Relevant to This Petition Since the Court Denied Review of *Barrow I*

There has been no relevant change to the record since the Court denied review of *Barrow I*.[5] Petitioner does, however, attempt to create such a change. Petitioner failed to plead and produce through discovery a number of the "facts" he proffers to this Court. *See* Pet. 19-20. The District Court held, just before trial, that he was thus precluded from offering these "facts" at trial to support a claim that Mrs. Barrow's choice of private education "impedes the operation or effectiveness of the state's educational program." Pet. App. 238-41. In fact, the school district admitted that Mrs. Barrow's exercise of her right to choose private education for her children did not impede the operation or effectiveness of the state's educational program in its answer and first amended answer. Pet. App. 240.

---

[5] *Barrow I* relied upon *Brantley* and *Fyfe* and as the *Barrow III* court noted, neither of those cases involved a "religious element." Pet. App. 20. Petitioner argues that the absence of a religious claim at this point in the case somehow should change the analysis of *Barrow I*. However, the clearly established law upon which *Barrow I* was based contained NO religious claims but purely parental rights claims. *Barrow III* agreed that no religious component was necessary.

This means that Petitioner's factual position from *Barrow I* to *Barrow III* never changed. In *Barrow I*, after extensive discovery and voluminous filings, the Fifth Circuit noted that Petitioner had no evidence of any disruption at all – and that was in 2003. Pet. App. 277-78. In 2005, on the eve of trial, Petitioner sought to present the "facts" he now relies upon in his petition to this Court before the jury. The district court, in its discretion, denied his request.[6]

There are, however, two intervening events worthy of consideration. The first is that a duly empanelled jury, led by a school board member of a nearby school district as foreman, awarded Mrs. Barrow compensatory and *punitive* damages against Petitioner, finding that he denied Mrs. Barrow the promotion because she educated her children in private school and that he knew he could be violating the law by doing so. Trial Testimony V.4, p. 197-98. The second is the Court's denial of certiorari in *Barrett v. Steubenville City Schs.*, 388 F.3d 967 (6th Cir. 2004), *cert. denied*, 546 U.S. 813 (2005), a case virtually identical to *Barrow* in fact, issue and outcome. *See* Section I-A, *supra*.

---

[6] This case is thus not an appropriate vehicle for deciding any of these fact issues raised because it is factbound and procedurally entangled. It was well within the district court's discretion to deny Petitioner leave to amend his Answer after years of litigation and appeals. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Ellis v. Liberty Life Assurance Co.*, 394 F.3d 262, 268 (5th Cir. 2004).

The substance of the present petition is remarkably similar to Petitioner's original petition for certiorari in *Barrow I*, which this Court declined to review. *Smith v. Barrow*, 540 U.S. 1005 (2003). In his original petition, Petitioner argued that the relevant law was "not clearly established." *Barrow I* Pet. 5-6, 8-21. In the present petition he argues that the relevant law is not clearly established. Pet. 22-26. In his original petition he claimed there was a circuit split. *Barrow I* Pet. 6, 25-26. In this petition he claims there is a circuit split. Pet. 16-17. In his original petition he claimed that Fifth Circuit precedent conflicts with that of this Court. *Barrow I* Pet. 6-7. In this petition he claims that Fifth Circuit precedent conflicts with that of this Court. Pet. 12-14.

Even the questions presented cover the same ground. In his original petition the substance of the two questions presented was, respectively, the fact-bound analysis of parental rights versus a public school's right to regulate its employees, and whether Petitioner was wrongly denied qualified immunity. *Barrow I* Pet. i. In this petition the substance of the first two questions presented are, respectively, the fact-bound analysis of parental rights versus a public school's right to regulate its employees, and whether Petitioner was wrongly denied qualified immunity. Pet. i. The only substantial difference between the petition for certiorari in *Barrow I* and the present petition is that Petitioner now wants this Court to correct alleged error in the district court's calculation and award of attorney fees, as well.

Petitioner fails to include even one intervening development in law or fact between *Barrow I* and *Barrow III* that justifies this Court's review of *Barrow III*. Review of *Barrow III* would be identical to a review of *Barrow I*, which, again, was denied by this Court in 2003. Considering the jury's factual findings, the substantially identical nature of this petition to the petition this Court denied review in *Barrow I* and this Court's refusal to review a case from a sister circuit almost identical in fact, issue and outcome, there appears little incentive to grant review in this the Petitioner's second request based on any development in law or fact.

II. *Saucier*'s "Rigid Order Of Battle" Was Irrelevant to the Outcome of This Case

Application of the *Saucier v. Katz*, 533 U.S. 194 (2001), "rigid order of battle" was a nonfactor both in *Barrow I* and *Barrow III*. In both instances, the Fifth Circuit relied solely upon *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983), and *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990), unanimous Fifth Circuit cases directly on point and covering twenty-five years of jurisprudence, to determine whether a constitutional violation had been clearly established. The analysis in *Barrow I* merely summarized this Fifth Circuit precedent to affirm a constitutional violation had been alleged, withholding its substantive analysis for determining whether that right was clearly established at the time Petitioner denied Mrs. Barrow her promotion. Pet. App. 274-78. *Barrow III* affirmed, similarly relying solely on

that same precedent and the findings of *Barrow I* to quickly dispense with whether a constitutional violation had been alleged and spend its substantive analysis on other issues. Pet. App. 11-13. In neither case was any substantive analysis spent on whether violation of a constitutional issue had been alleged. Instead, both in *Barrow I* and *Barrow III*, the Fifth Circuit made this determination solely by relying upon clearly established Fifth Circuit precedent involving the exact discrete issue presented. Pet. App. 6 ("In reaching our decision to reverse in *Barrow I*, we relied heavily on two of this court's previous opinions: *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983), and *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990).").

Petitioner tries to argue that the lack of success on a religious claim should change the result in this case. But the decisions cementing the clearly established law had nothing to do with religion. In *Brantley*, "there was no suggestion that the plaintiff's decision to send her son to private school was based on religion." Pet. App. 7. The court in *Brantley*, twenty-five years ago, held that in the public school environment, school officials could not take adverse employment actions against public school employees because of where the employee chooses to educate her children. Similarly in *Fyfe*, the plaintiff's "reasons for selecting a private education for her child were unrelated to religion." Pet. App. 8. Petitioner's attempt to avoid the jury verdict and the clearly established law of the Fifth Circuit for twenty-five years is not credible.

Because there was direct precedent within the Fifth Circuit, *Barrow I* was an easy call for the court. The law was clearly established for decades, as was also confirmed in *Barrow I* and *Barrow III*. There is no "two step" *Saucier* issue in this case. There was a violation, as found by the jury, and the law on point was clearly established by cases within the circuit for twenty-five years. Additionally, this case is a procedurally-tangled vehicle involving an extremely fact-bound application of the law-of-the-case doctrine, with no broader legal significance. *Barrow III* is presumably unpublished for that very reason. This Court has already denied review once in this case on the substantive issue and indeed has since denied review on an identical issue in *Steubenville*.

The *Saucier* "order of battle" played no role in the outcome of either *Barrow I* or *Barrow III*. As such, *Barrow III* should not be held for any determination of that issue.

III. The Petition Seeks Review of the Fact-Bound Application of Settled Legal Principles and the Fifth Circuit Applied the Law-of-the-Case Doctrine in a Factually Limited Manner

The unpublished decision of *Barrow III* applies the law-of-the-case doctrine in a factually limited manner. *Barrow I* relied upon *Brantley* and *Fyfe* and as the *Barrow III* court noted, neither of those cases involved a "religious element." Pet. App. 20. It was well settled law at all times relevant to this case that

a school employee's decision to educate her children in private school, whatever the motivation, was a protected right that could only be interfered with upon a showing by the school officials that the exercise of that right caused a material and substantial disruption. *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983); *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990). Given the longstanding history of the articulation of that right and the burden of proof, Petitioner still failed to plead and provide evidence during the discovery period to support a finding of material and substantial disruption. When Petitioner sought to amend his pleadings on the eve of trial, the district court denied him leave to do so and procedurally denied Petitioner the ability to present evidence of a disruption, which is why Petitioner cites to his Bill of Exception for outlandish "facts." Petitioner has not even preserved his Bill of Exception at this stage. The "facts" Petitioner relies on were not admitted at trial because Petitioner failed to plead disruption as a defense in a timely fashion.

The main thrust of Petitioner is a re-argument of *Barrow I* and his dissatisfaction with this Court's denying review of his original petition for certiorari. The unpublished decision of *Barrow III* applies the law-of-the-case doctrine in a factually limited manner. *Barrow I* relied upon clear Fifth Circuit precedent that has been established for over twenty-five years and was well settled law at all times relevant to this case. *See* Section II, *supra*. And as *Barrow III* noted, Petitioner's claims on appeal did not affect or change the relevant analysis and conclusions of

Barrow I. Pet. App. 20. As such, the Fifth Circuit's discretionary and reasonable application of the law-of-the-case doctrine, affirming the analysis of *Barrow I*, should not be reopened, now ***after*** a jury trial, as it was not "clearly erroneous" nor did it "work a manifest injustice." *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). Any disturbance in *Barrow III* of the earlier qualified immunity question would have required the Fifth Circuit to ignore the factual findings of the jury and twenty-five years of clearly established precedent.

The only essential facts of this case presumed in *Barrow I* was that Petitioner considered Mrs. Barrow's educational choice for her children when denying her a promotion. Petitioner maintained at trial that he never considered Mrs. Barrow's educational choice for her children when denying her a promotion, despite the overwhelming evidence and testimony from various school officials to the contrary. Trial Transcript V.4, p. 217-18, 219-20; V.1, p. 223-24; V.2, p. 185-86, 188. As of *Barrow III*, a jury had decided that Petitioner had indeed rejected Mrs. Barrow for a promotion because she educated her children in private school and that Petitioner "acted although he perceived a risk that his actions would violate Barrow's rights." Pet. App. 228-29.

Petitioner also claimed at trial that he thought he was not violating the law. Trial Transcript V.4, p. 193-94. Indeed, in *Barrow I*, the Fifth Circuit had the benefit of several affidavits from professional educators saying they did not think it was a violation of the

law. Pet. App. 280 n.19. The Fifth Circuit denied Petitioner qualified immunity and this Court denied review. However, a subsequent jury found that Petitioner denied Mrs. Barrow a promotion even though he subjectively perceived a risk that his actions would violate Mrs. Barrow's rights. Pet. App. 229. As a result, the jury awarded punitive damages for Petitioner's reckless decisions. Petitioner's position weakened after the jury trial.

An independent problem rendering this case yet a more problematic vehicle for deciding issues is the jury finding that Petitioner "acted although he perceived a risk that his acts would violate Barrow's rights," Pet. App. 228-29, and assessing punitive damages against him. This jury finding cuts against any claim of qualified immunity as the standard for punitive damages in a civil rights case is higher than that required to deny qualified immunity. Petitioner, however, has failed to challenge this finding. Therefore, the Fifth Circuit's discretionary and reasonable application of the law-of-the-case doctrine was appropriate as no new facts helpful to Petitioner were found by the jury and no new case law emerged from this Court or any other court, save this Court's denial of review in *Steubenville*.

IV. The District Court Did Not Abuse Its Discretion in Awarding Fees

In yet another attempt to manufacture a reason for review, it is disappointing that Petitioner's desperation led him to cite, quote and provide in the

appendix a confidential ADR proceeding, voluntarily submitted to by all parties, for the purpose of trying to settle the case. According to The Civil Justice Expense and Delay Reduction Plan (the "Plan") "[a]ll communications made during ADR procedures are confidential and protected from disclosure . . . " Misc. Order 46, Civil Justice Expense and Delay Reduction Plan, U.S. District Court for the Northern District of Texas, at 6 (rev. May 2002). The settlement conference ordered by the district court was under the authority of the ADR procedures and the Plan, ¶¶ (III)(C) and (IV). Thus, the settlement "report" by Judge Sanders is confidential. In addition, the federal Alternative Dispute Resolution Act of 1998 makes it clear that the Sanders settlement "Report" should not have been disclosed. 28 U.S.C. § 652(d). Furthermore, even if a neutral (Sanders) or party violates this prohibition, the disclosed dispute resolution communication – the Report – "shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made." 5 U.S.C. § 574(c).

Petitioner's attempt to create a certworthy issue by breaching confidentiality ultimately fares no better than his attempt to create a circuit split that does not exist. Damaging to this institution and the practice of law, such a breach further underscores the tenacious battle of this almost decade old case, the lengths to which Petitioner will go to manufacture a rationale for review, and why review should be denied. This would include Petitioner's mysterious reference to Judge Lindsay who has never been a

judge on this case merely as a way to attack one of the attorneys for Mrs. Barrow. Pet. 36. Petitioner's "scorched earth" defense strategy over nine years to cause Mrs. Barrow to quit did not work and the jury ruled against him. Now, he wishes to avoid all of the consequences of his approach and thus seeks review over fees.

With respect to attorney fees, "whether the reported hourly rate is reasonable and whether the reported tasks are duplicative or unrelated to the purposes of the law suit" is a factual question for the district court. *Associated Builders & Contractors of La., Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 379 (5th Cir. 1990). Such "[u]nderlying questions of fact are reviewed for clear error." *Adams v. Unione Mediterranea di Sicurta*, 364 F.3d 646, 656 (5th Cir. 2004); *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983). The "concept that a district court has broad discretion in determining the amount of a fee award" cannot be "overemphasize[d]." *Associated Builders*, 919 F.2d at 379. As "[a]ppellate courts have only limited opportunity to appreciate the complexity of trying any given case" such discretion is appropriate. *Hopwood v. Texas*, 236 F.3d 256, 277 (5th Cir. 2000). The Fifth Circuit relied upon Judge Fitzwater's thorough analysis of the record and found he did not abuse his discretion. Petitioner, likewise, has failed to present evidence of clear error.

Like attorney fees, a "district court's findings regarding the factual circumstances under which Rule 68 offers and judgments are made . . . are reviewed

under the clear error standard." *Basha v. Mitsubishi Motor Credit of Am., Inc.*, 336 F.3d 451, 453 (5th Cir. 2003). Petitioner claims that the district court "refused to apply" Rule 68. Pet. 40. What the district court found, however, was that Petitioner's offers of judgment were ineffective. Pet. App. 24. Petitioner includes only his $100,000.00 offer of judgment for review. The Fifth Circuit was correct that it was not clear error or abuse of discretion for the district court to refuse substantially to reduce Barrow's applicable attorney fees at the time of this offer. Pet. App. 24. Petitioner offers no substantial evidence to the contrary, and certainly none that demonstrates clear error.

This petition is all about attorney fees, which are decided under the abuse of discretion standard by the judge most intimately familiar with the attorneys and the case. No split of authority is alleged concerning the rejection of Petitioner's Rule 68 offer of judgment both by the district court and the Fifth Circuit. This is nothing more than a petition for error correction.

CONCLUSION

This petition for a writ of certiorari for *Barrow III* is substantially the same as the petition for *Barrow I*, which this court denied review. This petition should be denied as well.

Respectfully submitted,

KELLY J SHACKELFORD
Counsel of Record
HIRAM S. SASSER, III
ROGER L. BYRON
LIBERTY LEGAL INSTITUTE
903 East 18th Street, Suite 230
Plano, Texas 75074
Telephone: (972) 423-3131
Facsimile: (972) 423-6570

WM. CHARLES BUNDREN
2591 Dallas Parkway, Suite 300
Frisco, Texas 75034
Telephone: (972) 624-5338
Facsimile: (972) 624-5340

Attorneys for Respondent

91

(5)

No. 07-1089

FILED

APR 23 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DR. HERMAN SMITH,

Petitioner,

v.

KAREN JO BARROW,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

THOMAS P. BRANDT
Counsel of Record
JOSHUA A. SKINNER
ROBERT FUGATE
FANNING HARPER & MARTINSON, P.C.
4849 Greenville Ave., Suite 1300
Dallas, Texas 75206
(214) 369-1300

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REPLY TO BRIEF IN OPPOSITION 2

I. THE DECISION BELOW CONFLICTS WITH PRECEDENTS ACROSS THE COUNTRY 2

A. This Court's Precedents Do Not Establish that the Parental Right to Direct the Education of One's Children Is Entitled to Strict Scrutiny 2

B. There Is a Substantial Conflict Among the Circuits 4

C. The "Material and Substantial" Disruption Standard Is Inapplicable 9

II. THE FIFTH CIRCUIT ADMITTED THAT THE LAW WAS NOT CLEAR, BUT STILL IMPOSED LIABILITY 11

A. *Saucier*'s Rigid Order of Battle Rule 11

B. Smith Should Have Been Allowed to Argue Qualified Immunity 12

III. SMITH PRESENTS LEGAL, NOT FACTUAL, ISSUES REGARDING RULE 68 OFFERS OF JUDGMENT AND ATTORNEY'S FEES 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Arnett v. Kennedy, 416 U.S. 134 (1974) 7

Barrett v. Steubenville City Schs., 388 F.3d 967 (6th Cir. 2004), *cert. denied*, 546 U.S. 813 (2005) 5, 6

Behrens v. Pelletier, 516 U.S. 299 (1996) 12

Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) 7

Brantley v. Surles, 718 F.2d 1354 (5th Cir. 1983) 6

Breen v. Tex. A&M Univ., 485 F.3d 325 (5th Cir.), *withdrawn in part*, 2007 U.S. App. Lexis 18181 (5th Cir. 2007) 12

Christopher v. Harbury, 536 U.S. 403 (2002) 1, 12

C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159 (3rd Cir. 2005) 3

Cutts v. Fowler, 692 F.2d 138 (D.C. Cir. 1982) 3, 4

Garcetti v. Ceballos, 547 U.S. 410 (2006) 7

Kipps v. Caillier, 197 F.3d 765 (5th Cir. 1999) 12

Kipps v. Caillier, 205 F.3d 203 (5th Cir. 2000) 12

Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001) 3

Loving v. Virginia, 388 U.S. 1 (1967) 3, 4

Meyer v. Nebraska, 262 U.S. 390 (1923) 2, 6

Montgomery v. Carr, 101 F.3d 1117 (6th Cir. 1996) 3, 5

TABLE OF AUTHORITIES – Continued

Page

Morse v. Frederick, ___ U.S. ___, 127 S. Ct. 2618 (2007) 7

Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988) 9

Ohio Ass'n of Indep. Schs. v. Goff, 92 F.3d 419 (6th Cir. 1996) 9

Pickering v. Bd. of Educ., 391 U.S. 563 (1968) 6

Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) 2, 4, 6

Reno v. Flores, 507 U.S. 292 (1993) 3

Runyon v. McCrary, 427 U.S. 160 (1976) 2, 8, 9

Saucier v. Katz, 533 U.S. 194 (2001) 11, 12

Stough v. Crenshaw City Bd. of Educ., 744 F.2d 1479 (11th Cir. 1984) 5, 6, 7

Teague v. Lane, 489 U.S. 288 (1989) 1

Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) 6

Troxel v. Granville, 530 U.S. 57 (2000) 2, 3

United States v. Nixon, 418 U.S. 683 (1974) 1

Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) 10

Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 6

U.S. Const. amend. XIV, § 1 ..... 6, 7

TABLE OF AUTHORITIES – Continued

Page

STATUTES

5 U.S.C. § 551 13

5 U.S.C. § 571 13

5 U.S.C. § 572 13

5 U.S.C. § 573 13

5 U.S.C. § 574 13

42 U.S.C. § 1981 8

RULES

FED. R. CIV. P. 68 13

INTRODUCTION

> [W]e acknowledge that it is possible to argue that without a situation akin to that in *Wisconsin v. Yoder*, ... only rational basis – and not strict scrutiny – should be applied in evaluating a state action that imposes requirements on parental decisions regarding education.... *Yoder* arguably supports Smith's contention that heightened scrutiny is appropriate only where the state action also adversely affects free exercise of religion, which the jury verdict in this case makes clear is no longer at issue.

App. 17-18 (*Barrow III*).

This Court should grant Smith's petition to resolve a conflict which was recognized by all three judges in *Barrow III* and to address important *legal* issues regarding qualified immunity, attorney's fees and offers of judgment. This Court is neither constrained by "law of the case" nor by its previous decision denying Smith's pre-trial petition. *See Teague v. Lane*, 489 U.S. 288, 296 (1989). This Court normally addresses issues when the case has been concluded so as to avoid unnecessary constitutional determinations. *Christopher v. Harbury*, 536 U.S. 403, 417 (2002); *United States v. Nixon*, 418 U.S. 683, 690 (1974). This case is now ripe for review in a way that it was not before.

The conflict recognized in *Barrow III* underscores the vitality of Smith's qualified immunity claim. By recognizing that rational basis scrutiny might be proper, *Barrow III* essentially admitted not only that

the law was not clearly established but that there may not have been a constitutional violation. If rational basis scrutiny applies, then no violation occurred since Smith articulated a rational basis for his conduct. If the level of scrutiny was not clearly established, then Smith is entitled to qualified immunity.

REPLY TO BRIEF IN OPPOSITION

I. THE DECISION BELOW CONFLICTS WITH PRECEDENTS ACROSS THE COUNTRY.

A. THIS COURT'S PRECEDENTS DO NOT ESTABLISH THAT THE PARENTAL RIGHT TO DIRECT THE EDUCATION OF ONE'S CHILDREN IS ENTITLED TO STRICT SCRUTINY.

Because this Court has repeatedly used the language of rational basis scrutiny when evaluating parental rights claims, Barrow's argument that there is no conflict is without merit. *See Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) ("reasonable relation"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("reasonable relation"); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (rational basis scrutiny); *Runyon v. McCrary*, 427 U.S. 160, 177-79 (1976) ("reasonable government regulation").

Barrow does not explain how this Court's repeated use of rational basis scrutiny can be reconciled with her claim that strict scrutiny applies. Barrow only offers an oblique reference to *Troxel v. Granville*,

530 U.S. 57 (2000), a case decided *after* the events of the case at bar, and a citation to *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). However, *Troxel* did not "articulate the appropriate standard of review." *Id.* at 80 (Thomas, J., concurring); *see also Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 289 (5th Cir. 2001); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3rd Cir. 2005).

Moreover, not all rights described as fundamental receive strict scrutiny. For example, rational basis scrutiny applies to anti-nepotism policies, which affect the fundamental right to marry. *Montgomery v. Carr*, 101 F.3d 1117, 1125 (6th Cir. 1996). Anti-nepotism rules "play a legitimate and laudatory role in preventing conflicts of interest" and do not prohibit the protected association, but only prevent the employment that violates the policy. *Cutts v. Fowler*, 692 F.2d 138, 141 (D.C. Cir. 1982).

The comparison between parental rights and the right to marry is particularly apt. *Cutts* upheld the FCC's anti-nepotism policy against a claim that it violated the fundamental right to marry enunciated by this Court when it struck down Virginia's miscegenation law. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). Since the FCC's anti-nepotism policy did not impose a direct burden on the right to marry, it was found to be constitutional as a legitimate measure to prevent favoritism and conflicts of interest. *Cutts*, 692 F.2d at 141.

Analogously, this Court established that a state violates a parent's right to direct the education of his or her children when it prohibits parents from choosing private education for their children. *Pierce*, 268 U.S. at 534-35. In both *Loving* and *Pierce*, the state attempted to directly prevent citizens from exercising their rights. In contrast, anti-nepotism policies and school patronage policies do not directly target the exercise of rights. The patronage policy did not prevent Barrow from sending her children to private school, it only prevented her from being promoted into an administrative position in which she would have, by her own admission, created an apparent conflict of interest and possibly a decline in morale caused by her appearance of dissatisfaction with the public schools.[1] *See Cutts*, 692 F.2d at 141. The patronage policy was a reasonable regulation designed to address a legitimate governmental interest.

B. THERE IS A SUBSTANTIAL CONFLICT AMONG THE CIRCUITS.

Barrow tries to ignore the substantial conflict among the circuits regarding the level of scrutiny to apply to the parental right to direct the education of

---

[1] Barrow agreed that a reasonable person could form the opinion that a school administrator lacks confidence in the public schools if she has her children enrolled in private school and that reasonable people could disagree about whether that decision would materially and substantially impair the mission of the school. R. Vol. 61, pp. 4622-23 and DN 439, pp. 244-45.

one's children. She argues that similar patronage policies have not been upheld and that there is a workable distinction between the management of the public schools and an administrator's decision regarding her children's education. Barrow's arguments are without merit.

1. Barrow's Reliance on *Barrett* and *Stough* Is Misplaced.

Barrett v. Steubenville City Schs., 388 F.3d 967 (6th Cir. 2004), *cert. denied*, 546 U.S. 813 (2005), does not support Barrow because it implies that rational basis scrutiny applies. Because *Barrett* was an interlocutory appeal from a denial of a *motion to dismiss*, the Sixth Circuit held that it must accept the allegation that Barrett "was denied employment *only* because he was exercising his right to educate his son in a manner of his choice." *Id.* at 973 n.3 (emphasis in original). The facts assumed at the motion to dismiss stage distinguished *Barrett* from *Montgomery*, in which the Sixth Circuit, after trial on the merits, upheld an anti-nepotism policy that infringed on the fundamental right to marry. *Montgomery* held that the right to marry could be infringed by a rational policy aimed at a legitimate governmental interest. 101 F.3d at 1124-26. *Barrett* held that the teacher had alleged that he was terminated because of his exercise of his parental right *only* and not because of any legitimate governmental interest such as an anticipated negative effect of his choice. 388 F.3d at 973 and n.3.

Barrow's reliance on *Stough v. Crenshaw City Bd. of Educ.*, 744 F.2d 1479 (11th Cir. 1984), is also misplaced. *Stough* relied on the same Fifth Circuit case as *Barrow I* in its mistaken application of a First Amendment free speech standard to Fourteenth Amendment parental rights claims. 744 F.2d at 1480 (citing *Brantley v. Surles*, 718 F.2d 1354, 1359 (5th Cir. 1983)). *Brantley*, borrowing from cases involving free speech rights in public schools, held that a school district cannot restrict an employee's choice to send his or her child to a private school without demonstrating that the choice would cause a "material and substantial" disruption to the operation of the schools. 718 F.2d at 1359 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980)).

Pickering and *Van Ooteghem* were free speech employment retaliation cases, while *Tinker* involved the regulation of student free speech. These cases did not involve parental rights claims under the Fourteenth Amendment. While *Brantley* mentioned *Meyer*, *Pierce*, and *Yoder* as embodying this Court's recognition of a right to familial privacy, *Brantley* failed to examine what level of scrutiny was employed in those cases. As the Fifth Circuit unanimously recognized in *Barrow III*, *Brantley*'s standard may be in conflict with this Court's precedents. App. 17-18.

Barrett and *Stough* support Smith's claim that this Court should grant his petition. *Barrett*, if it establishes a level of scrutiny for parental rights,

applied rational basis scrutiny. *Stough* highlights that the Fifth Circuit's erroneous application of free speech jurisprudence to Fourteenth Amendment parental rights claims is being adopted by other circuits and should be corrected before it further impedes the ability of schools to impose reasonable regulations on public school employees. The government "must have wide discretion and control over the management of its personnel." *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974).

2. The Conduct of Public School Administrators Inside and Outside of Schools Cannot Be Neatly Separated.

Barrow tries to distinguish between policies which regulate the inside of public schools with those that regulate the outside, arguing that rational basis scrutiny only applies to "policies relating to what goes on at the public school." Opp. 6-7. This distinction is unworkable and inconsistent with this Court's precedents. This Court has previously noted that public school officials have a vitally important job and that it is impossible to separate their conduct inside and outside of the schools. *See Morse v. Frederick*, ___ U.S. ___, 127 S. Ct. 2618, 2629 (2007); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986). Because of this dual role, when a citizen enters government service the citizen must accept certain limitations on his or her freedom. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

Barrow proposes that courts ignore the fact that administrators can affect schools by the decisions they make outside the physical boundaries of their schools. The Texas Association of School Boards Legal Assistance Fund (TASB-LAF) explained that it is impossible to separate the public and private actions of administrators, particularly in small school districts such as Greenville Independent School District. *See* TASB-LAF Br. 10. Barrow's own testimony[2] confirmed that a reasonable person could form the opinion that a school administrator lacks confidence in the public schools if her children attend a private school and that reasonable people could disagree about whether that decision would materially and substantially impair the mission of the school. R. Vol. 61, pp. 4622-23 and DN 439, pp. 244-45. The distinction maintained by Barrow in her Brief and by the Fifth Circuit in *Barrow III* does not reflect the reality of how school administrators interact with their communities.

In addition, this Court and lower courts have applied rational basis scrutiny in contexts that do not involve the internal operation of public schools. In *Runyon*, this Court, applying rational basis scrutiny, upheld the application of 42 U.S.C. § 1981 to private segregated schools, holding that a parent's right to direct the education of his or her children did not entitle parents to choose schools that practiced

---

[2] Barrow's deposition occurred after *Barrow I*.

segregation. 427 U.S. at 176-79. *Runyon*, which held that parents "have no constitutional right to provide their children with private school education unfettered by reasonable government regulation," did not relate to the internal operation of public schools. Lower courts have also applied rational basis scrutiny to parental rights claims that do not relate to the internal operation of public schools. *See, e.g., Ohio Ass'n of Indep. Schs. v. Goff*, 92 F.3d 419, 423 (6th Cir. 1996) (non-public schools); *Murphy v. Arkansas*, 852 F.2d 1039, 1043-44 (8th Cir. 1988) (home-schooled children).

C. THE "MATERIAL AND SUBSTANTIAL" DISRUPTION STANDARD IS INAPPLICABLE.

Smith contends that rational basis scrutiny, not the higher "material and substantial disruption" standard, is proper. Inexplicably, Barrow responds by contending that the district court correctly excluded evidence (including Barrow's deposition testimony) that shows that a reasonable person could have believed Barrow's conduct would cause a material and substantial disruption.[3]

---

[3] Barrow refers to the excluded evidence as if it is not worthy of consideration. *See* Opp. 15. The "outlandish facts" relied on by Smith, however, include Barrow's own deposition testimony.

Smith is not asking this Court to determine whether the evidence established a defense of "material and substantial" disruption because Smith contends that the parental rights claims is subject to rational basis scrutiny. Whether or not Barrow's testimony would have supported an affirmative defense, it certainly supports Smith's contention that there was a rational basis for his conduct. *Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (rational basis scrutiny requires the plaintiff to disprove all rational bases). Barrow cannot claim that Smith's rational basis argument or his claim of qualified immunity was improperly pled. In light of Smith's actual argument, there is no reason why Smith would have needed to plead an affirmative defense of "material and substantial" disruption. If rational basis scrutiny applies, then the burden would be on Barrow, not on Smith. Barrow would have had to prove that there was no rational basis for the policy and Smith would not have had to plead an affirmative defense of "material and substantial" disruption. Moreover, even if this Court holds that the "material and substantial" disruption standard applies, the law was not clearly established. The evidence excluded by the district court establishes that Smith was objectively reasonable in imposing a patronage policy on school administrators.[4]

---

[4] Barrow makes much of the fact that the jury awarded punitive damages. It should come as no surprise, however, in light of the fact that the district court prohibited Smith from

(Continued on following page)

II. THE FIFTH CIRCUIT ADMITTED THAT THE LAW WAS NOT CLEAR, BUT STILL IMPOSED LIABILITY.

A. *SAUCIER*'S RIGID ORDER OF BATTLE RULE.

The elephant in the room that Barrow does not even attempt to address is the fact that the unanimous panel in *Barrow III* was unsure whether Barrow's constitutional rights were violated. As all three judges admitted, *Barrow I* and the "material and substantial" standard might conflict with this Court's decision in *Wisconsin v. Yoder*. App. 17-18.

Barrow I superficially followed the rigid order of battle mandated in *Saucier v. Katz*, 533 U.S. 194 (2001), but it failed to identify the origin of the constitutional right it was analyzing or to enunciate the applicable level of scrutiny. App. 275, 280 n.20. *Barrow III*, rather than reforming the inadequacies of *Barrow I*, perpetuated them by applying the "law of the case" to a decision that all three judges acknowledged might conflict with this Court's precedent. App. 19. *Barrow III*'s adherence to the erroneous decision in *Barrow I* ignored the fact that *Barrow I* was decided without the benefit of the jury's findings. App. 19-20.

---

presenting evidence showing why such a patronage policy was reasonable.

Because interlocutory appeals and unnecessary determinations of constitutional principles are generally to be avoided, *Christopher*, 536 U.S. at 417, this Court should carefully consider how the rigid order of battle mandated in *Saucier* tends to result in confusing pre-trial decisions on constitutional matters. *See Breen v. Tex. A&M Univ.*, 485 F.3d 325, 335-37 (5th Cir.) (confusion whether a pre-trial qualified immunity appeal recognized new cause of action), *withdrawn in part*, 2007 U.S. App. Lexis 18181 (5th Cir. 2007).[5]

B. SMITH SHOULD HAVE BEEN ALLOWED TO ARGUE QUALIFIED IMMUNITY.

Permitting Smith to present evidence regarding qualified immunity at trial and to re-urge qualified immunity based on the findings of the jury follows logically from *Behrens v. Pelletier*, 516 U.S. 299 (1996), in which an adverse ruling on qualified immunity at the motion to dismiss stage did not preclude the qualified immunity defense in a later motion for summary judgment. *Id.* at 306-07. A pre-trial ruling denying qualified immunity should not be

---

[5] *Also compare Kipps v. Caillier*, 197 F.3d 765, 769 n.4 (5th Cir. 1999) ("Whether a constitutional liberty interest is implicated ... is highly questionable") with the denial of rehearing in *Kipps v. Caillier*, 205 F.3d 203, 204 (5th Cir. 2000) ("we have little trouble finding that a constitutional interest in familial association does, in fact, exist and was clearly established at the time Kipps was fired.").

used as "law of the case" to strip a public official from presenting evidence of the reasonableness of his conduct in support of his qualified immunity or to counter a claim for punitive damages.

III. SMITH PRESENTS LEGAL, NOT FACTUAL, ISSUES REGARDING RULE 68 OFFERS OF JUDGMENT AND ATTORNEY'S FEES.

Smith seeks a ruling on three discrete *legal* issues: (1) whether district courts are required to award fees for time spent on numerous unreasonable and unsuccessful motions; (2) whether an award of fees can be based on unreliable billing records; and (3) whether a district court can disregard its own factual findings to thwart a Rule 68 offer of judgment.

Rather than respond to Smiths' legal arguments, Barrow presents a meritless contention regarding the alleged confidentiality of Judge Sanders' report, a report that is a public record and that the district court specifically authorized Smith to make use of it in responding to Barrow's fee application. *See, e.g.*, App. 42 n.1 ("As permitted, [Smith] adopted materials already on file [including] Judge Sanders' June 27, 2004 report."). The Fifth Circuit entirely ignored Barrow's specious argument.[6] This Court should not be distracted by Barrow's empty rhetoric describing

---

[6] Barrow's reliance on the federal Alternative Dispute Resolution Act is meritless because it does not apply to the federal courts. *See* 5 U.S.C. §§ 551(1)(b), 571(1), 572, 573, 574.

this case as "fact-bound" or "procedurally entangled." The facts are simple, the procedures straightforward and the legal issues important.

In a case in which her actual damages were $15,455, Barrow could have early on accepted Smith's offers of judgment and been made whole. Instead, she decided to litigate. The costs to the parties and to the judicial system have been enormous. Barrow's attorney's fee award alone amounts to almost two-thirds of a million dollars. By granting Smith's petition, this Court can clarify the law in such a way as to ensure the just, speedy and inexpensive resolution of future civil disputes.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS P. BRANDT
Counsel of Record for Petitioner
Texas Bar No. 02883500
JOSHUA A. SKINNER
Texas Bar No. 24041927
ROBERT FUGATE
Texas Bar No. 00793099
FANNING HARPER &
MARTINSON, P.C.
Two Energy Square
4849 Greenville Ave., Suite 1300
Dallas, Texas 75206
(214) 369-1300 Telephone
(214) 987-9649 Telecopier
Attorneys for Petitioner
Dr. Herman Smith

91

(4)

No. 07-1089

FILED
APR 14 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DR. HERMAN SMITH,

Petitioner,

v.

KAREN JO BARROW,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

DENISE WILKERSON
Counsel of Record
MELINDA BARLOW
CITY ATTORNEY'S OFFICE
CITY OF ARLINGTON, TEXAS
MAIL STOP #63-0300
POST OFFICE BOX 90231
ARLINGTON, TEXAS 76004-3231
(817) 459-6878
(817) 459-6897 (FAX)

April 14, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 3

ARGUMENT 5

A. The test for "clearly established law" should be not only knowing that a right exists, but knowing what standard applies in evaluating the action that interfered with that right 5

B. A pretrial determination of a constitutional question in a qualified immunity appeal should not deny the defendant the opportunity to argue his objective good faith to the jury 9

C. Reversal is necessary to ensure efficient operation of local governments 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Bd. Of Trs. of the Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 7

Bolling v. Sharpe,
347 U.S. 497 (1954) 6

Butz v. Economou,
438 U.S. 478 (1978) 9

Cozzo v. Tangipahoa Parish Council-President Gov't,
279 F. 3d 273 (5th Cir. 2002) 3

Davis v. Scherer,
468 U.S. 183 (1984) 6

Elder v. Holloway,
510 U.S. 510 (1994) 1

Elliot v. Perez,
751 F.2d 1472 (5th Cir. 1985) 10

FCC v. Beach Communications, Inc.,
508 U.S. 307 (1993) 7

Fla. Bar v. Went For It, Inc.,
515 U.S. 618 (1995) 8

Gregoire v. Biddle,
177 F.2d 579 (2nd Cir. 1949) 10

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 2, 4, 5, 9, 10

Heller v. Doe,
509 U.S. 312 (1993) 7

Johnson v. Breeden,
280 F.3d 1308 (11th Cir. 2002) 11

Littlefield v. Forney Indep. Sch. Dist.,
268 F.3d 275 (5th Cir. 2001) 6

Malley v. Briggs,
475 U.S. 335 (1986) 3

McClendon v. City of Columbia,
258 F.3d 432 (5th Cir. 2001) 6

McLaughlin v. Florida,
379 U.S. 184 (1964) 7

Mitchel v. Forsythl,
472 U.S. 511 (1985) 10

Oliveira v. Mayer,
23 F.3d 642 (2d Cir. 1994) 11

Pagan v. Fruchey,
492 F.3d 766 (6th Cir. 2007) 8

Pierson v. Ray,
386 U.S. 547 (1967) 10

Poe v. Ullman,
367 U.S. 497 (1961) 6

Saucier v. Katz,
533 U.S. 194 (2001) 5, 6, 10

Siegert v. Gilley,
500 U.S. 226 (1991) 5, 10

United States v. Virginia,
518 U.S. 515 (1996) 7

Willingham v. Crooke,
412 F.3d 553 (4th Cir. 2005) 11, 12

Wis. v. Yoder,
406 U.S. 205 (1972) 8

Wood v. Strickland,
420 U.S. 308 (1975) 10

OTHER SOURCES

SUP. CT. R. 37.6 1

U.S. Bureau of Census, Federal, State and Local Governments, 2002 Census of Governments, *Preliminary Report No. 1*, July 2002 available at http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf. 1

U.S. Bureau of Census, *Local Government Employment and Payroll*, March 2003, *available at* http://ftp2.census.gov/govs/apes/03locus.txt . . . 2

U.S. Department of Labor, Bureau of Labor Statistics, *Industry at a Glance*, December 29, 2005, *available at* http://www.bls.gov/iag/government.htm 2

INTEREST OF *AMICUS CURIAE*[*]

The International Municipal Lawyers Association (IMLA) is a nonprofit professional organization that serves as a resource for local government attorneys. IMLA is an advocate for the nation's local governments and provides its 1,400 members with information and advice on legal issues facing local governments.

Local governments are composed of numerous public officials, including but not limited to, police officers, librarians, building inspectors, code enforcement officers, and elected officials. The doctrine of qualified immunity shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law. *Elder v. Holloway*, 510 U.S. 510, 512 (1994). There are nearly 87,900 local governments in the United States, including over 3,000 county governments, over 19,400 municipal governments, over 16,500 townships, over 13,500 school districts and over 35,100 special districts.[1] With more than 11.5 million full-time

---

[*] Counsel of record for all parties waived the right to receive notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. The parties' consent to amicus briefing and the waiver of the 10 days notice requirement is being filed concurrently with this brief. In accordance with SUP. CT. R. 37.6, amici states that no counsel for either party has authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

[1] *See* U.S. Bureau of Census, Federal, State and Local Governments, 2002 Census of Governments, *Preliminary Report*

employees,[2] local governments account for 10.5% of full-time employment in the United States.[3] By contrast, state governments account for only 3.5% and the federal government for only 2.2% of full-time employment.[4]

The members of IMLA have an immediate interest in the departure by the Fifth Circuit from the well-established principles of qualified immunity for public officials. More specifically, the threshold standard for imposing personal liability on a public official must be clarified and applied uniformly across the United States. A judicial interpretation that admits that the standard for evaluating the public official's action is not clear, but still imposes liability, greatly diminishes the firmly rooted tradition of immunity jurisprudence. The central purpose of affording public officials qualified immunity from suit is to protect them "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). Public officials routinely make decisions that place limits on a

---

No. 1, July 2002 *available at* http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf.

[2] *See* U.S. Bureau of Census, *Local Government Employment and Payroll*, March 2003, *available at* http://ftp2.census.gov/govs/apes/03locus.txt.

[3] *See* U.S. Department of Labor, Bureau of Labor Statistics, *Industry at a Glance*, December 29, 2005, *available at* http://www.bls.gov/iag/government.htm.

[4] *Id.*

citizen's or employee's constitutional rights. They limit the expression of dancers in sexually oriented businesses, they limit religious expression on police uniforms and in public areas, and they put internet filters on library computers, to name a few examples. Public officials also know that these decisions are subject to three possible levels of scrutiny — rational basis, heightened scrutiny, or strict scrutiny — depending on the constitutional right being infringed. Thus, if it is arguable that only a rational basis and not strict scrutiny should apply in evaluating a particular action, the official cannot be said to act with conscious disregard for the established law when the standard for evaluating their conduct is unclear.

STATEMENT OF THE CASE

IMLA adopts the Statement of the Case set forth in the Brief of Petitioner.

SUMMARY OF ARGUMENT

It is well-settled that public officials are protected by the doctrine of qualified immunity. "The Supreme Court has characterized the doctrine as protecting all but the plainly incompetent or those who knowingly violate the law.'" *Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273 (5th Cir. 2002) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). A required element of the imposition of liability on a public official has always been a threshold showing of a violation of a "clearly established law." This case requires that the Supreme Court determine whether the law is "clearly established" when there is judicial disagreement in the

case about the standard of review of the public official's action. Additionally, does a pretrial determination of a constitutional question in a qualified immunity appeal deny the defendant the opportunity to have his immunity protection decided by the facts determined by the jury?

In resolving this matter, the Court should hold that the standard for "clearly established law" is not only knowing that a constitutional right exists, but knowing what standard applies in evaluating the action that interfered with that right. There is nothing in the history of the doctrine that supports using a different standard. The standard that the Fifth Circuit suggests should be flatly rejected. Instead, the Court should apply the test that has evolved in qualified immunity jurisprudence. This will bring a consistency in standards across the federal circuits, while confirming the importance of the qualified immunity protections balanced against the rights of the citizen or employee.

The Fifth Circuit's broad interpretation of "clearly established law" will result in public officials acting with timidity and hesitation while they research conflicting legal opinions and attempt to determine future federal precedent. Even the experienced District Court jurist was unaware of "this clearly established law" when he evaluated the school administrator's conduct by a rational basis standard. Dilution of the protections of qualified immunity may deter able people from public service and inhibit public servants in their discretionary actions. *Harlow*, 457 U.S. at 815 – 17.

Finally, a pretrial determination of a Constitutional question in a qualified immunity appeal should not deny the defendant the opportunity to argue his objective good faith to the jury. A summary judgment motion is a threshold determination based on the facts as *alleged* by the plaintiff. The intent is to protect the public servant from the substantial costs of litigation, prevent excessive disruption of government, and permit resolution of patently insubstantial claims. *Id.* at 818-19. It should not operate to deprive the public servant the opportunity to prove his entitlement to qualified immunity based on the factual determination made by the jury. A public official cannot reasonably be said to "to know" that the law forbade such conduct, when the jury found that the conduct that required heightened scrutiny of his actions did not take place. This Court should grant Smith's petition in order to address these important issues concerning qualified immunity.

ARGUMENT

A. The test for "clearly established law" should be not only knowing that a right exists, but knowing what standard applies in evaluating the action that interfered with that right.

To determine whether a public official is entitled to qualified immunity, the court must first answer the threshold question whether, taken in the light most favorable to the party asserting the injury, the alleged facts show that conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (citing *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)). "If no

constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* If a violation could be made out on a favorable view of the parties' submissions, "the next, sequential step is to ask whether the right was clearly established." *Id.*; *Davis v. Scherer*, 468 U.S. 183, 190 (1984). "The objective reasonableness of allegedly illegal conduct is assessed in light of the rules clearly established at the time it was taken." *McClendon v. City of Columbia*, 258 F.3d 432, 438 (5th Cir. 2001) (footnote omitted). Thus, "clearly established" includes the rules in existence for evaluating the conduct, not just the existence of the right. For more than eighty years, the due process interest of parents to direct the upbringing and education of their children, standing alone, warranted no more than rational-basis review. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 289 (5th Cir. 2001).

In general, "liberty under law extends to the full range of conduct which the individual is free to pursue." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see also Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (describing liberty as "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints"). The recognition of a parent's liberty interest in choosing to educate her children in a private school does not *per se* mean that it is a fundamental right subject to strict scrutiny.

Generally, the equal protection guarantee of the Constitution is satisfied when the government

differentiates between persons for a reason that bears a rational relationship to an appropriate governmental interest. *See Heller v. Doe*, 509 U.S. 312, 320 (1993). However, in limited circumstances when the subject of the different treatment is a member of a class that historically has been the object of discrimination, the Supreme Court has required a higher degree of justification than a rational basis, either strict or intermediate scrutiny. Under the strict scrutiny test, the government must demonstrate a compelling need for the different treatment and that the provision in question is narrowly tailored to achieve its objective. *See McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). Under intermediate scrutiny, the government must at least demonstrate that the classification is substantially related to an important governmental objective. *See United States v. Virginia*, 518 U.S. 515, 533 (1996). The suspect or quasi-suspect classes that are entitled to heightened scrutiny have been limited to groups generally defined by their status, such as race, national ancestry or ethnic origin, alienage, gender and illegitimacy, and not by the conduct in which they engage. The administrator's decision in this case, was based on the conduct that the employee engaged in — choosing to educate her children in a private school — and not on her status. Where rational-basis scrutiny applies, the government actor need not articulate his reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negate "'any reasonably conceivable state of facts that could provide a rational basis for the [regulation].'" *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (quoting *Heller*, 509 U.S. at 320; *FCC v. Beach*

Communications, Inc., 508 U.S. 307, 313 (1993)). Under a rationale basis analysis, the burden at trial should have been on the plaintiff to show that no reasonably conceivable state of facts existed to support the regulation.

Where heightened scrutiny applies, a restriction on a constitutional protected right will be upheld if the government "assert[s] a substantial interest in support of its regulation," "demonstrate[s] that the restriction directly and materially advances that interest[,]" and draws the regulation narrowly. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995). Regulations on commercial speech or based on gender are some of the types of cases subject to a heightened scrutiny standard of review. *Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007). By requiring the defendant superintendent to "prove that the employee's selection of private school materially and substantially affects the state's education mission," the Fifth Circuit is applying *de facto* heightened or strict scrutiny.

In *Barrow I* the parental interests were combined with free exercise interests, therefore the Fifth Circuit reversed the district court's finding of qualified immunity because of the application of a stricter standard than rational basis review. *See Wis. v. Yoder*, 406 U.S. 205, 233 (1972). ("When the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a reasonable relation to some purpose within the competency of the State is required to sustain the validity of the State's requirement under the First Amendment." (citations and internal quotations

omitted)). Thus, while the Court employed more than a rational basis standard with reference to the First Amendment free exercise clause, it is clear that the due process interest of parents to direct the upbringing and education of their children, standing alone, warranted no more than rational-basis review. *Barrow II* removed the possibility of a religious element to Barrow's claims. The Fifth Circuit, while acknowledging "it is possible to argue" that the rationale basis test applied, still maintained that the school district had the burden to show that Barrow's decision had a "materially adverse effect on the public school district". This impermissible shifting of the burden to the defendant superintendent, stripped him of the qualified immunity protection, a protection deemed necessary in order to have effective government. See *Harlow,* 457 U.S. at 817.

For all these reasons, this Court should reject a standard for "clearly established law" that admits that the standard of review that should apply under these circumstances is uncertain.

B. A pretrial determination of a constitutional question in a qualified immunity appeal should not deny the defendant the opportunity to argue his objective good faith to the jury.

Immunity protects the public from unwarranted timidity on the part of public officials by, for example, "encouraging the vigorous exercise of official authority," *Butz* v. *Economou,* 438 U.S. 478, 506 (1978), by contributing to "'principled and fearless

decision-making,'" *Wood* v. *Strickland,* 420 U.S. 308, 319 (1975) (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967) and by responding the concern that would, in Judge Hand's words, "'dampen the ardor of all but the most resolute, or the most irresponsible'" public officials. *Harlow,* 457 U.S. at 814 (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950); see also *Mitchel v. Forsythl,* 472 U.S. 511, 526 (1985) (lawsuits may "distract officials from their governmental duties"). Thus, the purpose of the immunity doctrine is not only to protect public officials from liability for damages, but also to protect them from substantial costs, which result from merely being required to defend. *Elliot v. Perez*, 751 F.2d 1472, 1476-79 (5th Cir. 1985). A summary judgment motion is merely a threshold determination. This initial inquiry requires the court to determine if the official's conduct violated a constitutional right by reviewing the alleged facts in the light most favorable to the party asserting the injury. *Siegert,* 500 U.S. at 232. The intent of allowing a ruling early on that issue is so that the costs and expenses of trial are avoided where the immunity defense is dispositive. *Saucier*, 533 U.S. at 200. It should not operate to deprive the public servant the opportunity to prove his entitlement to qualified immunity based on the factual determination made by the jury. A public official cannot reasonably be said to "to know" that the law forbade such conduct, when the jury found that the conduct that required heightened scrutiny of his actions, did not take place. When a case is remanded for trial following the denial of qualified immunity on appeal, the defendant official

is still entitled to assert the defense at the trial of the merits.

In this case, upon remand from the Fifth Circuit, the District Court refused to allow the Superintendent a reasonable opportunity to present evidence in support of his qualified immunity defense. The Fifth Circuit affirmed, citing the doctrine of the law of the case. In fact, because the jury actually rejected Barrow's free exercise claim that had been assumed during the first appeal and because additional evidence was offered at trial that was not presented during summary judgment, the "case" in *Barrow III* was not the same as the "case" in *Barrow I*. The Fifth Circuit's application of law of the case is at odds with other circuit courts and improperly insulated from review an incorrect ruling on substantive constitutional law — a ruling that is binding on thousands of public officials. For the Fifth Circuit to say that the jury's findings of fact are irrelevant to a public servant's entitlement to immunity ignores the considerable importance of qualified immunity in the efficient operation of government.

Although entitlement to qualified immunity is a legal question to be decided to the court, the factual issues underlying the qualified immunity analysis may be submitted to a jury. *Willingham v. Crooke*, 412 F.3d 553, 558-59 (4th Cir. 2005). In those cases in which genuine issues of fact material to the qualified immunity defense remain, the factual dispute should be resolved at trial by the trier of fact. *Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002); see also *Oliveira v. Mayer*, 23 F.3d 642, 650 (2d Cir. 1994)

("The District Court should have let the jury (a) resolve these factual disputes and (b) based on its findings, decide whether it was objectively reasonable for the defendants to believe that they were acting within the bounds of the law when they detained the plaintiffs"). This being the case, "the district court should submit factual questions to the jury and reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury." *Willingham*, 412 F.3d at 560. Since the jury rejected the free exercise claim in this case, the District Court should have reviewed the defendant's actions by the rational basis test. That is what District Court did in *Barrow I*, and he found that the superintendent was entitled to immunity.

C. Reversal is necessary to ensure efficient operation of local governments.

This case illustrates the type of decisions that should be entitled to qualified immunity protections. It is easy to see the potential difficulty public officials would have if the standard for clearly established violation of a constitutional right were diluted to the level set by the Fifth Circuit. Would every conflicting opinion issued among the circuits be subject to review and scrutiny by public officials in the hopes that the decisions they make guess which circuit's opinion will prevail in the future?

Public officials should be denied qualified immunity on summary judgment only when the alleged violation is of a clearly established constitutional right and the standard of review of that violation is clearly

understood as established by existing precedent. Even then, the defendant should be entitled to present evidence of his entitlement to immunity to the jury. Denial of the right to a qualified immunity defense under such circumstances will result in overburdening public officials and adversely affect operational efficiency of government. This case presents an opportunity to avoid such harm to public officials.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

DENISE WILKERSON
COUNSEL OF RECORD
MELINDA BARLOW
CITY ATTORNEY'S OFFICE
CITY OF ARLINGTON, TEXAS
Mail Stop #63-0300
Post Office Box 90231
Arlington, Texas 76004-3231
(817) 459-6878
(817) 459-6897 (FAX)

91

(3)

No. 07-1089

FILED

APR 11 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DR. HERMAN SMITH,

Petitioner,

v.

KAREN JO BARROW,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF PETITIONER

LISA A. BROWN
Counsel of Record
BRACEWELL & GIULIANI LLP
711 Louisiana, Suite 2300
Houston, Texas 77002
(713) 223-2300

ERIN GLENN BUSBY
411 Highland
Houston, Texas 77009

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY 2

ARGUMENT 5

I. The Court should grant the writ to resolve the conflict over the proper level of scrutiny to be applied to parental rights claims 5

A. The conflict in the lower courts regarding the proper level of scrutiny leaves schools without guidance in implementing a broad range of policies 6

B. The court of appeals' decision creates an inconsistency with the treatment of other family rights in the same context 13

II. Smith's right to present a qualified immunity defense at trial should not have been foreclosed by the denial of his summary judgment or by the Fifth Circuit's erroneous application of law of the case 15

A. A school official's immunity defense does not vanish from the case after an unsuccessful motion for summary judgment; the Fifth Circuit's ruling to the contrary is out of step with other circuits 15

TABLE OF CONTENTS – Continued

Page

B. The Fifth Circuit's law of the case ruling is inconsistent with other appellate decisions and undermines the purpose of qualified immunity 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Angstadt v. Midd-West Sch. Dist., 377 F.3d 338 (3d Cir. 2004) 6

Arizona v. California, 460 U.S. 605 (1983) 21, 23

Barrow v. Greenville Indep. Sch. Dist. (*Barrow III*), 2007 WL 3085028 (5th Cir., Oct. 23, 2007) ..... *passim*

Beecham v. Henderson County, 422 F.3d 372 (6th Cir. 2005) 13

Behrens v. Pelletier, 516 U.S. 299 (1996) 4, 5, 17, 18

Blau v. Fort Thomas Public Sch. Dist., 401 F.3d 381 (6th Cir. 2005) 7

Brantley v. Surles, 718 F.2d 1354 (5th Cir. 1983) 8, 9

Brosseau v. Hagen, 534 U.S. 194 (2004) 17

Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525 (1st Cir. 1995) 7

C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159 (3d Cir. 2005) 7

Curley v. Klem, 499 F.3d 199 (3d Cir. 2007) 15, 19, 20

Doe v. Heck, 327 F.3d 492 (7th Cir. 2003) 12

Fields v. Palmdale Sch. Dist., 427 F.3d 1197 (9th Cir. 2005) 7

Fyfe v. Curlee, 902 F.2d 401 (5th Cir. 1990) 8, 14

TABLE OF AUTHORITIES – Continued

Page

Garcetti v. Ceballos, 547 U.S. 410 (2006).....14

Gary S. v. Manchester Sch. Dist., 374 F.3d 15 (1st Cir. 2004).....6

Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000).....12

Hamilton v. Leavy, 322 F.3d 776 (3d Cir. 2003).....21

Harlow v. Fitzgerald, 457 U.S. 800 (1982).....16

Herndon v. Chapel-Hill Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996).....7

Hooks v. Clark County Sch. Dist., 228 F.3d 1036 (9th Cir. 2000).....6, 11

Immediato v. Rye Neck Sch. Dist., 73 F.3d 454 (2d Cir. 1996).....7, 9

Kipps v. Callier, 197 F.3d 765 (5th Cir. 1999).....9

Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003).....7, 8

Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001).....7, 9

Meyer v. Nebraska, 262 U.S. 390 (1923).....9, 11

Montgomery v. Carr, 101 F.3d 1117 (6th Cir. 1996).....13, 14

Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988).....11

Oladeinde v. City of Birmingham, 230 F.3d 1275 (11th Cir. 2000).....21

Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008).....7

TABLE OF AUTHORITIES – Continued

Page

Pickering v. Bd. of Educ., 391 U.S. 563 (1968) 8

Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) 9, 11

Runyon v. McCrary, 427 U.S. 160 (1976) 11

Saucier v. Katz, 533 U.S. 194 (2001) 16, 17, 24

Scott v. Harris, 127 S.Ct. 1769 (2007) 18, 23

Stephenson v. Doe, 332 F.3d 68 (2d Cir. 2003) 20

Swanson v. Guthrie Indep. Sch. Dist. No. 1-L, 135 F.3d 694 (10th Cir. 1998) 6

Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) 8

Troxel v. Granville, 530 U.S. 57 (2000) 12

Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980) 8

Vaughn v. Ruoff, 304 F.3d 793 (8th Cir. 2002) 21

Waters v. Churchill, 511 U.S. 661 (1994) 14

Waters v. Gaston County, 57 F.3d 422 (4th Cir. 1995) 13

Willingham v. Crooke, 412 F.3d 553 (4th Cir. 2005) 18, 19

Wilson v. Layne, 526 U.S. 603 (1999) 23

Wilson v. Morgan, 477 F.3d 326 (6th Cir. 2007) 22

Wisconsin v. Yoder, 406 U.S. 205 (1972) 9

Wysong v. City of Heath, 2008 WL 185798 (6th Cir., Jan. 22, 2008) 22

TABLE OF AUTHORITIES – Continued

Page

RULES

Fed. R. Civ. Pro. 56 18

INTEREST OF AMICUS CURIAE[1]

The Texas Association of School Boards (TASB) established the Legal Assistance Fund (LAF) under a Trust Agreement 26 years ago. The purpose of the LAF is to assist parties whose positions are aligned with the interests of Texas school districts by advocating through litigation for issues or causes that generally affect or will affect the public schools of Texas. Nearly 800 of the state's 1,036 public school districts are members of the LAF.

A Board of Trustees governs the LAF. The Board has nine members from three different entities: (1) TASB; (2) the Texas Association of School Administrators (TASA); and (3) the Texas Council of School Attorneys (TCSA).

TASB is a Texas non-profit corporation whose voluntary membership consists of the 1,036 school boards in the State. TASB's members are responsible for governing Texas public schools. TASB's mission is to promote educational excellence for Texas school children through advocacy, visionary leadership, and high quality services to school districts. Through a contract with the LAF, TASB provides administrative

---

[1] The parties were notified more than ten days before the due date of the amicus' intent to file. The parties have given written consent to the filing of this brief. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the amicus curiae and their counsel made any monetary contribution to the preparation or submission of this brief.

services to the LAF. TASB also serves as the contract administrator for the TASB Risk Management Fund (RMF), a separate legal entity which was created as an administrative agency of cooperating local governments under the Texas Interlocal Cooperation Act. The RMF's general objectives are to formulate, develop, and administer, on behalf of RMF members, a program of collective self-funding of risk and benefits. A board operates the RMF on a non-profit basis. The RMF was not involved in the drafting or funding of this *amicus curiae* brief.

TASA represents the state's school superintendents and other administrators responsible for carrying out the education policies adopted by their boards of trustees. TASA's mission is to promote, provide, and develop leadership that champions educational excellence.

The TCSA is a council associated with TASB. TCSA's purpose is to improve the quality and effectiveness of legal services to school districts throughout the state of Texas.

SUMMARY

The Court should grant the writ to resolve the conflict in the lower courts over two important questions: the proper level of scrutiny to be applied to parental rights claims and the proper method of addressing the defense of qualified immunity at a

trial on the merits following a pretrial denial of immunity at the summary judgment stage.

School officials on a daily basis must make a wide range of policy decisions that affect the parental rights of school employees and parents of students. Depending on the circuit and the policy at issue, however, schools may face rational basis scrutiny, strict scrutiny, or something in between for review of these decisions. The lack of a uniform approach to addressing parental rights claims in the courts of appeals has injected confusion and uncertainty into many areas of school administration.

In this case, the court below acknowledged precedents favoring rational basis review of the employment policy at issue, but it ultimately applied heightened scrutiny, if not strict scrutiny. Citing its own past decisions, the court held that the policy would be permissible only if the school could show that it was necessary to prevent a material and substantial disruption of the school's educational mission. The Fifth Circuit's formulation of heightened scrutiny is not drawn from this Court's parental rights cases, but, rather, was imported from this Court's and the Fifth Circuit's free speech precedents.

Given the frequency of parental rights challenges against schools, the need for guidance from the Court is acute. If the standard will differ in different contexts, as the lower court held, then these boundaries must be appropriately defined. Such guidance will assist school officials in making constitutionally

sound decisions regarding a broad range of school policies.

This case also presents an important question regarding the proper handling of qualified immunity at trial following an unfavorable ruling at the motion for summary judgment stage. The Fifth Circuit held that, because of an adverse pretrial ruling, the superintendent was precluded from asserting immunity at trial. This holding is out of step with other circuits, which generally agree that immunity does not vanish from the case after an adverse pretrial determination. An unfavorable qualified immunity ruling at the summary judgment stage merely means that the official must stand trial; it does not mean that the official has forfeited his immunity from paying damages. Other courts agree that the district court still may grant immunity at the close of plaintiff's evidence or after the jury has rendered factual findings. The Fifth Circuit's "law of the case" ruling is inconsistent with these other appellate decisions and severely undermines the purpose of qualified immunity.

This Court's decision in *Behrens v. Pelletier*, 516 U.S. 299 (1996), demonstrates that an unfavorable pretrial determination regarding immunity will not prevent the public official from asserting the defense at later stages of the litigation. In *Behrens*, the Court held that a public official who unsuccessfully appeals the denial of a motion to dismiss is entitled to take a second interlocutory appeal following the denial of a subsequent motion for summary judgment. This case

represents the next logical step after *Behrens*. While *Behrens* concerned a motion for summary judgment filed after an unsuccessful motion to dismiss, *Barrow* concerns a trial on the merits after an unsuccessful motion for summary judgment. Just as the immunity analysis may be "different on summary judgment than on an earlier motion to dismiss," 516 U.S. at 309, the immunity analysis may be different at trial than on an earlier motion for summary judgment. This Court should grant the writ and clarify the process for handling qualified immunity at trial after an unfavorable immunity ruling at the summary judgment stage.

ARGUMENT

I. The Court should grant the writ to resolve the conflict over the proper level of scrutiny to be applied to parental rights claims.

The decision by the court of appeals below added complexity and confusion to an area of the law – the treatment of parental rights – in which schools already face uncertainty. The court of appeals' application of heightened scrutiny to a parental rights claim not combined with a free exercise claim not only conflicts with standards applied by other circuits, it creates tension with the treatment of other intimate association claims in the same context.

A. The conflict in the lower courts regarding the proper level of scrutiny leaves schools without guidance in implementing a broad range of policies.

The lower courts have not adopted a uniform approach to addressing parental rights claims. They have applied standards varying from rational basis scrutiny, to a heightened or intermediate scrutiny, to strict scrutiny. Consequently, schools lack certainty about the level of scrutiny that will be given to their policies when a parental rights challenge is made.

This uncertainty and lack of uniformity is a matter of great importance to schools and parents. Disputes over parental rights arise in many contexts and are a source of considerable litigation against the public schools. Parents have challenged policies touching on all aspects of school management, including regulations and policies affecting home-school and private school students[2] and respecting such matters

---

[2] *See, e.g.*, *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15 (1st Cir. 2004) (parents of disabled child who attended private religious school challenged provision of greater special education services to public school students than to private school students); *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338 (3d Cir. 2004) (parents challenged school district's refusal to permit girl enrolled in cyber charter school to participate in interscholastic basketball); *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036 (9th Cir. 2000) (parents challenged school district's refusal to provide speech therapy services to home-school students); *Swanson v. Guthrie Indep. Sch. Dist. No. 1-L*, 135 F.3d 694 (10th Cir. 1998) (parents challenged district's policy not to allow home-school student to attend public school part-time).

as health education, community service requirements, and school dress codes.[3]

Schools need guidance from the Court on what scrutiny should be applied to these school regulations. Such guidance will assist school officials in making constitutionally sound decisions, which in turn will aid in reducing costly litigation involving disputes over parental rights claims and the related issue of whether a school official is entitled to qualified immunity from a parental rights claim.

In this case, an applicant for an administrative position claimed that her parental rights were infringed by a policy requiring her to enroll her children

---

[3] *See, e.g., Parker v. Hurley,* 514 F.3d 87 (1st Cir. 2008) (parent challenged curriculum); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005) (parent challenged administration of student questionnaire that sought personal information used to plan student-related community activities); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (parent challenged school's requirement that his son attend a mandatory health course); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001) (parent challenged school uniform policy); *Blau v. Fort Thomas Public Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005) (parent challenged dress code); *Herndon v. Chapel-Hill Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996) (parent challenged requirement that students perform 50 hours of community service); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996) (parent challenged community service program); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005) (parent challenged administration of a survey including questions on sexual subjects); *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995) (parents challenged students' compelled attendance at AIDS awareness assembly).

in public school. *Barrow v. Greenville Indep. Sch. Dist.* (*Barrow III*), 2007 WL 3085028 (5th Cir., Oct. 23, 2007). In reviewing this claim, the court acknowledged precedents favoring rational basis review, but it ultimately applied heightened scrutiny, if not strict scrutiny. Following *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983), and *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990), the court of appeals held that the school's actions would be permissible only if Barrow's sending her children to a private school "materially and substantially" impeded the operation or effectiveness of the educational program. 332 F.3d at 848. While this does not meet all the requirements of strict scrutiny, it is clearly more stringent than requiring that a policy rationally further a legitimate state objective.

The Fifth Circuit's formulation of intermediate scrutiny is not drawn from any of this Court's parental rights cases. The *Brantley* court imported the "material and substantial" interference standard from this Court's and Fifth Circuit precedents regarding the exercise of free speech rights by school employees and students. *See Brantley*, 718 F.3d 1354, 1359 (*citing Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969), and *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980)). While describing this Court's precedents

in *Pierce*, *Meyer*, and *Yoder*[4] as recognizing a right to familial privacy, the *Brantley* court failed to examine what level of scrutiny was employed in those cases. Perhaps it is for this reason that the Fifth Circuit in *Barrow III* "acknowledge[d] that it is possible to argue that . . . only rational basis – and not strict scrutiny – should be applied in evaluating a state action that imposes requirements on parental decisions regarding education." *Barrow III*, 2007 WL 3085028 at 7.

The Fifth Circuit has in fact previously applied a less stringent standard when assessing a parental rights claim. In *Littlefield v. Forney Independent School District*, 268 F.3d 275 (5th Cir. 2001), which involved a challenge to a school uniform policy, the court stated that rational basis is the proper level of scrutiny "in the public school context."[5] This decision is consistent with the analysis of several other circuits. *See, e.g., Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461-462 (2d Cir. 1996) (holding that rational basis review applies when "parents seek for secular

---

[4] *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[5] The court also applied what appears to have been rational basis review in a case involving a university coach who was terminated when his son decided to enroll at a rival college. In *Kipps v. Callier*, 197 F.3d 765, 769 (5th Cir. 1999), the court held that the school's concerns about a negative impact on "alumni relations and recruiting efforts" were objectively reasonable and, thus, the defendants were immune from the coach's claims. *Kipps* did not require proof of a material and substantial disruption.

reasons to exempt their child from an educational requirement and the basis is a claimed right to direct the 'upbringing' of their child").

The court below attempted to distinguish parental rights cases dealing with issues such as school curriculum on the ground that those cases relate "to what goes on at the public school" while a school's decision not to promote a teacher does not "*in any way* relate to what occurs" at school. *Barrow III*, 2007 WL 3085028 at 7 (emphasis added). The court's assertion that personnel decisions do not relate "in any way" to what occurs at school is out of touch with the reality of school management. A successful school administrator wears many hats: educator, counselor, disciplinarian, public relations manager, and community leader. Amici's collective experience is that the selection of assistant principals, principals, and superintendents and the assignment of specific personnel to particular campuses unquestionably impacts what occurs at any given school. The ability of a district to transform a struggling school into a successful one very often hinges on the right combination of personnel on the campus. This is particularly true in small, one-high-school districts such as Greenville ISD, but it also is true in urban areas where convincing parents to support a troubled campus is paramount among the administrator's duties.

In addition, courts have applied rational basis review to parents' claims that regulation of matters outside the public schools infringed their right to

direct their children's education. For example, in *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988), the Eighth Circuit held that the Arkansas Home School Act (in particular the Act's requirements that parents file information with the school district and submit children to standardized testing) was subject only to rational basis review. *See also Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036 (9th Cir. 2000) (school district's provision of speech therapy services only to students who attended a school, *i.e.*, were not homeschooled, was subject only to rational basis review).

The application of rational basis scrutiny to parental rights claims concerning education is consistent with this Court's precedents. This Court stated in *Meyer v. Nebraska*, 262 U.S. 390 (1923), that parental rights may not be infringed "by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Id.* at 399-400; *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (parental rights "may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state"). The Court echoed the language of rational basis scrutiny in *Runyon v. McCrary*, 427 U.S. 160 (1976), holding that there is no right to a private education that is "unfettered by reasonable regulation." *Id.* at 177.

Some circuit courts, however, have applied more stringent standards to parental rights claims on the

basis that they implicate "fundamental rights." *See, e.g., Doe v. Heck*, 327 F.3d 492, 519 (7th Cir. 2003) ("after *Troxel*, it is not entirely clear what level of scrutiny is to be applied" in familial relations cases; "What is evident, however, is that courts are to use some form of heightened scrutiny in analyzing these claims."); *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000) (stating that "[t]he primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest."). These decisions follow this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), in which the plurality opinion referred to parental rights as "fundamental liberty interests" and in which Justice Thomas's opinion treated parental rights as "fundamental rights."

Depending on the circuit and on the policy at issue, schools may face rational basis scrutiny, strict scrutiny, or something in between. If, as the lower court held, the standard will differ in different contexts, then those boundaries should be precisely defined. The Court should grant the petition to resolve these conflicts and to provide greater certainty to school officials whose jobs routinely require them to make decisions that affect school employees, students, and parents.

B. The court of appeals' decision creates an inconsistency with the treatment of other family rights in the same context.

The court's decision below also creates an anomaly in the permissible regulation of school employees. While *Barrow* requires heightened scrutiny of policies affecting the parent-child relationship, courts have applied rational basis scrutiny to policies affecting other rights of intimate association. For example, courts have applied rational basis scrutiny to anti-nepotism policies that affect the right to marry. *Montgomery v. Carr*, 101 F.3d 1117, 1125 (6th Cir. 1996) (upholding rule that prevented two married teachers from working at the same campus); *Waters v. Gaston County*, 57 F.3d 422, 426 (4th Cir. 1995) (upholding rule that barred spouses from working in the same county department). Courts have also applied rational basis review to decisions to fire an employee based on a romantic relationship with another married employee. *Beecham v. Henderson County*, 422 F.3d 372 (6th Cir. 2005). This Court should explain why – if such is the case – it is necessary to apply differing levels of scrutiny to these similar situations.

When rational basis applies, as it does in the anti-nepotism cases, school officials are not required to prove the occurrence of an actual campus disruption in order to justify the employment regulation. *See, e.g., Montgomery*, 101 F.3d at 1130-32 (rejecting plaintiff's argument that the free speech disruption

standard should apply to challenge of nepotism rule; free speech claims required a higher level of scrutiny). Instead, they are required to show only that the policy is rationally related to a legitimate government interest. *Id.*

A school official who must show a "material and substantial" interference with an educational program bears a heavy burden. In *Fyfe*, one of the cases relied on by the court below, a boycott of local businesses had been threatened if any of the school district's employees enrolled their children in segregated private schools. *Fyfe v. Curlee*, 902 F.2d at 405. Even in the face of such a threat, the court held that the school district must show an actual relationship between the plaintiff's enrollment of her daughter in a segregated private school and the boycott to establish "material and substantial interference with the school system's operations and effectiveness." *Id.* Such a stringent requirement is inconsistent with general rules regarding schools' ability to manage their campuses and intrudes upon their authority to do so. *See also Waters v. Churchill*, 511 U.S. 661, 671-72, 673 (1994) (plurality) (acknowledging that the Court has "consistently given greater deference to government predictions of harm" when the government is regulating its employees rather than the public at large); *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (government employees must accept certain limitations of their freedom).

II. Smith's right to present a qualified immunity defense at trial should not have been foreclosed by the denial of his summary judgment or by the Fifth Circuit's erroneous application of law of the case.

A. A school official's immunity defense does not vanish from the case after an unsuccessful motion for summary judgment; the Fifth Circuit's ruling to the contrary is out of step with other circuits.

The Fifth Circuit erred when it held that Smith could not assert a qualified immunity defense at trial following the denial of immunity on the first appeal. Although there is a split among the circuit courts on the precise *process* for addressing immunity once the case has returned to the district court, other circuit courts agree that the defense does not vanish on remand.[6] This Court should grant the petition to provide guidance to the lower courts on the important

---

[6] A recent decision from the Third Circuit catalogs the split, which centers on whether there is a role for the jury in deciding factual issues germane to immunity. *See Curley v. Klem*, 499 F.3d 199, 208 (3d Cir. 2007) (because immunity disputes often involves mixed questions of fact and law, "one is left to ask who should answer them" – the judge or the jury). The Third Circuit noted that the First, Fourth, Seventh, and Eleventh Circuits have approached the matter differently from the courts in the Fifth, Sixth, Ninth, and Tenth Circuits. *Id.* In *Curley*, the court ultimately held that it was proper for the trial court to ask the jury a specific question as to whether the officer's mistake was reasonable. *Id.* at 215.

question of the proper handling of immunity during a trial on the merits.

In this case, contrary to the practice in other circuits, the district court felt so constrained by the appellate ruling in *Barrow I* that it rejected Smith's contention that immunity remained a viable defense, and it denied him an opportunity to present evidence in support of it at trial.[7] The Fifth Circuit affirmed, citing the doctrine of the law of the case. The Fifth Circuit's application of law of the case is at odds with other circuit courts and improperly insulated from review an incorrect ruling on substantive constitutional law – a ruling that is binding on thousands of school employees.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court recognized the important role of immunity in protecting public officials from the disruption and costs associated with litigation. Qualified immunity shields a public officer from suit when he or she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances that the officer confronted. *See Saucier v. Katz*, 533 U.S. 194, 200-201 (2001). The Court has defined a two-part process for evaluating

---

[7] The district court concluded that *Barrow I* "certainly settled the issue of Dr. Smith's non-entitlement to immunity" and that Smith's contention that he was allowed to assert immunity at trial "cannot withstand scrutiny." (App. 143.) Smith's arguments were "foreclosed" by the law of the case. (App. 144.)

claims of immunity. The first step is to determine whether the plaintiff has actually articulated a violation of the Constitution. *Saucier*, 522 U.S. at 201 (stating that the court must evaluate whether, "in the light most favorable to the party asserting the injury," the party has alleged facts showing that the officer violated a constitutional right). If the plaintiff has alleged a constitutional violation, then the court must ask whether the right was clearly established at the time of the official's conduct. *Saucier*, 533 U.S. at 201; *Brosseau v. Hagen*, 534 U.S. 194, 198 (2004) (reasonableness is judged against the backdrop of the law at the time of the conduct). If the law at the time of the conduct did not clearly establish that the officer's conduct would violate the Constitution, "the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau*, 534 U.S. at 198.

The immunity defense is so important that the Court has authorized public officials to file more than one interlocutory appeal of lower court rulings denying immunity. In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court specifically rejected the argument that a defendant who unsuccessfully appeals the denial of a motion to dismiss is precluded from filing a second appeal after the denial of a subsequent motion for summary judgment. *Behrens* demonstrates that an unfavorable pretrial determination regarding immunity will not prevent the public official from asserting the defense at later stages of the litigation. The Court recognized that the immunity analysis

"will be different on summary judgment than on an earlier motion to dismiss," when the parties are limited to an assessment of the conduct as alleged in the plaintiff's complaint. *Id.* at 309.

This case represents the next logical step after *Behrens*. While *Behrens* concerned the presentation of immunity via a motion for summary judgment filed after an unsuccessful motion to dismiss, *Barrow* concerns the presentation of immunity at trial following an unsuccessful motion for summary judgment. Just as the immunity analysis may be "different on summary judgment than on an earlier motion to dismiss," *id.* at 309, the immunity analysis may be different at trial than at the summary judgment stage.

When the defense of immunity is presented in a motion for summary judgment,[8] the trial court is obligated to view all of the evidence in the light most favorable to the non-movant. *See Scott v. Harris*, 127 S.Ct. 1769, 1774 (2007) ("As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury," thus courts must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing'" the motion). At trial, of course, the jury is "not required to view the facts in the light most favorable to [the plaintiff]." *Willingham v. Crooke*, 412 F.3d 553 (4th Cir. 2005). Thus, the qualified immunity defense remains viable

[8] Fed. R. Civ. Pro. 56.

upon remand. *Id.* at 559. For example, in *Willingham*, on a subsequent appeal after a trial on the merits, the court rejected the plaintiff's argument that the ruling in the first appeal definitively disposed of the qualified immunity issue because the evidence at summary judgment was essentially the same as the evidence produced at trial. "[I]n affirming the denial of summary judgment we decided only that the forecasted evidence, when viewed in the light most favorable to Willingham, established a violation of clearly established law." *Id.*

In *Barrow I*, in rejecting Smith's immunity defense, the Fifth Circuit acknowledged that its analysis required it to view the facts in the light most favorable to Barrow. 332 F.3d at 846. *Barrow I*, thus, did not conclusively decide immunity for all purposes. An unfavorable immunity ruling on appeal merely means that the public official must stand trial; it does not mean that the official has forfeited his immunity from paying damages. Upon remand, the trial court must evaluate whether the evidence *at trial* demonstrates that the defendant actually violated a clearly established constitutional right in an objectively unreasonable manner. Depending on the facts presented at trial, the trial court still may grant immunity at the close of the plaintiff's evidence or after the jury has rendered factual findings. *See, e.g., Curley v. Klem*, 499 F.3d 199 n. 12 (3d Cir. 2007) (concluding that neither the jury nor the district court was bound "by our earlier statements involving a hypothetical

set of facts favoring [the plaintiff], since the facts and inferences actually found by the jury were clearly different than those which we were required to posit in *Curley I* when considering the summary judgment order"); *Stephenson v. Doe*, 332 F.3d 68, 80-81 (2d Cir. 2003) (recommending the use of special interrogatories to decide the facts while requiring the district court "to make the ultimate legal determination of whether qualified immunity attaches on those facts").

The Fifth Circuit's ruling disallowing the defense of immunity at trial is at odds with other circuits and is contrary to the public policy that informs the Court's immunity jurisprudence. This Court should grant the petition to clarify the process that the lower courts must use when addressing the defense of qualified immunity following an appellate denial of immunity.

B. The Fifth Circuit's law of the case ruling is inconsistent with other appellate decisions and undermines the purpose of qualified immunity.

In *Barrow III*, the court of appeals acknowledged that Smith's rational basis argument had merit, particularly in light of the jury's rejection of Barrow's

religion claim, but it refused to revisit the issue of immunity, claiming law of the case.[9]

Law of the case is an "amorphous concept" that directs a court's discretion but "does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618 (1983). The doctrine of law of the case does not apply if the prior decision is "clearly erroneous and would work a manifest injustice." *Id.* Appellate courts appropriately have rejected law of the case arguments in immunity cases where the evidence at trial was different than the evidence presented at summary judgment.[10]

---

[9] *See, e.g., Barrow III*, 2007 WL 3085028 at 7 (acknowledging "that it is possible to argue" that only rational basis should apply) and at 8 ("*Yoder* arguably supports Smith's contention that heightened scrutiny is appropriate only where the state action also adversely affects free exercise of religion, which the jury verdict in this case makes clear is no longer at issue").

[10] *See, e.g., Hamilton v. Leavy*, 322 F.3d 776 (3d Cir. 2003) (court of appeals was not bound by the denial of qualified immunity in the first appeal because new evidence was introduced upon remand; "[t]his exception to the law of the case doctrine makes sense because when the record contains new evidence, 'the question has not really been decided earlier and is posed for the first time' "); *Vaughn v. Ruoff*, 304 F.3d 793 (8th Cir. 2002) (earlier panel opinion denying qualified immunity in parental rights case was not binding in subsequent appeal; the opinion on the first appeal was prompted by the court's duty to give all reasonable inferences to the plaintiffs and did not foreclose some other analysis "when all the evidence was in"); *Oladeinde v. City of Birmingham*, 230 F.3d 1275 (11th Cir. 2000) (law of the case did not apply to third appeal in First Amendment case where prior panel did not explain its decision and

(Continued on following page)

During the first appeal, the court assumed that Barrow's evidence supported a free exercise claim and a parental rights claim, and it treated these claims in tandem. The jury, however, ultimately found that Barrow's evidence in fact did not support a free exercise claim. This fact alone demonstrates that the landscape of the case had changed between *Barrow I* and *Barrow III*.

The court during the first appeal also concluded, *based on the summary judgment record then available*, that Smith had not produced evidence demonstrating that Barrow's enrollment of her children in private school "would negatively impair district operations." *Barrow*, 332 F.3d at 848. Setting aside for a moment the Fifth Circuit's errors in imposing a burdensome disruption standard on Smith's decision, Smith should have been permitted to introduce evidence regarding the negative impact on district operations. The district court, however, refused to recognize the viability of immunity on remand and disallowed much of Smith's evidence. (R. 4603.) The

---

where evidence at trial was different); *Wilson v. Morgan*, 477 F.3d 326 (6th Cir. 2007) (holding that earlier denial of qualified immunity was not law of the case as to the issue of probable cause; "[n]othing in our prior decision precluded the magistrate judge from considering the probable cause question because it was unclear at that time which officers knew what information"); *Wysong v. City of Heath*, 2008 WL 185798 (6th Cir., Jan. 22, 2008) (unpublished) (holding that court of appeals was not bound by first denial of qualified immunity where substantially new evidence was introduced after remand).

excluded evidence included testimony from Barrow herself that individuals in the community reasonably could view a senior administrator's decision to enroll her children in private school as a vote of no-confidence in the public schools. (R. 4603, 4622-4623.) This testimony, from Barrow's 2005 deposition, was not part of the 2003 appeal. (R. 4622-4623.)

Against this backdrop – a summary judgment standard that favored Barrow's view of the evidence during the first appeal, the district court's improper determination that qualified immunity had vanished from the case after remand, and the jury's subsequent rejection of Barrow's religion claims – the *Barrow III* court erred when it applied the law of the case to block reconsideration of Smith's immunity defense to the parental rights claim.

The doctrine of law of the case was "understandably crafted with the course of ordinary litigation in mind." *Arizona*, 460 U.S. at 618. Because of their decisive role in defining the parameters of clearly established law, immunity appeals are not ordinary litigation. A major purpose of declaring constitutional rules within an immunity appeal is to provide guidance to other government officials who will be affected by the ruling. *See Wilson v. Layne*, 526 U.S. 603, 609 (1999) (deciding the constitutional question first "promotes clarity in the legal standards for official conduct"); *see also Scott v. Harris*, 127 S.Ct. 1769, 1774 (2007) (stating that, in an immunity appeal, it may be necessary to "set forth principles which become the basis for a [future] holding that a

right is clearly established") (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). This purpose is not served when a court of appeals applies law of the case to refuse to consider an immunity defense in light of all the facts of the case.

This Court should grant the petition and clarify the process for handling immunity at trial after the denial of summary judgment.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

LISA A. BROWN
Counsel of Record
BRACEWELL & GIULIANI LLP
711 Louisiana, Suite 2300
Houston, Texas 77002
(713) 223-2300

ERIN GLENN BUSBY
411 Highland
Houston, Texas 77009